Nos. 06-713 and 06-730

In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.; LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.,

Respondents.

STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY, ET AL.; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, ET AL.; LIBERTARIAN PARTY OF WASHINGTON STATE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS WASHINGTON STATE REPUBLICAN PARTY, ET AL.

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QUESTIONS PRESENTED

May Washington State force the Republican Party to associate, on election ballots, the official Voters' Pamphlet and other State-mandated disclosures, with any candidate who self-selects the Republican Party as his "preference"?

May Washington State continue the same state conduct previously held to violate the federal Constitution and defeat the First Amendment right of the Republican Party to select its standard bearers, its "ambassadors to the general electorate," by making minor cosmetic changes to its election statutes?

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STATEMENT OF THE CASE

This case, once again, directly presents the question whether the First Amendment permits a state to re-define the scope of the Republican Party's association at the crucial moment of choosing the Party's standard bearers for the general election. Initiative 872 ("I-872") established a partisan primary that forces the Republican Party to be associated with any candidate seeking to use the Republican Party name to advance his candidacy, whether or not the Republican Party desires to associate with that candidate. I-872 also forces the Republican Party to have its standard bearers for the general election chosen by all voters, including supporters of rival parties. I-872's purpose was to alter the Republican Party message and messenger, in effect continuing Washington's prior, unconstitutional blanket primary by "restor[ing] the kind of choice that voters enjoyed for seventy years with the blanket primary." Official Voters' Pamphlet "Statement For" I-872, JA 407. *See also* "Yes on I-872" home page, JA 79. The following key features of the blanket primary were replicated by I-872:

	Former Blanket Primary	**I-872**
The Republican Party must nominate its candidates in the primary election.	WASH. REV. CODE § 29.30.095 (2002)	§ 7(2), JA 413
Voters can vote for any candidate for each office without limitation on party affiliation.	WASH. REV. CODE § 29.18.200 (2002)	§ 5, JA 412
Candidates are identified on the ballot by party affiliation.	WASH. REV. CODE § 29.30.020(3) (2002)	§ 4, JA 412; § 7(3), JA 414

The courts below held that the partisan primary established by I-872 violates the First Amendment. The district court held that I-872 is constitutionally indistinguishable from the partisan blanket primaries declared unconstitutional by this Court in *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*") and the Ninth Circuit in *Democratic Party of Wash. v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom., Wash. State Grange v. Wash. State Democratic Party*, 541 U.S. 957 (2004) ("*Reed*"):

> In all constitutionally relevant respects, Initiative 872 is identical to the blanket primary invalidated in *Reed*: (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Pet. App. 72a (footnote marker omitted).[1] The court held that I-872 was not a "nonpartisan blanket primary" under *Jones*, because I-872 continues to select political party nominees. Pet. App. 71a.

The district court also invalidated the candidate filing provisions of I-872 that forced the Republican Party to be

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[1] Citations to "Pet. App." are to the Appendix to the petition of the State of Washington.

associated on the ballot with any candidate who self-designates the Republican Party as representing of his beliefs and policies, holding the statute violated the Party's right of association under the First Amendment. Pet. App. 79a. Applying the same test as Washington courts, the court rejected petitioners' argument that the partisan features of I-872 could be severed from the remainder of the initiative. Pet. App. 89a. The court entered a permanent injunction against implementation of I-872.[2] Pet. App. 93a-96a.

The court of appeals affirmed, concluding that a candidate's ability to "self-identify with a particular party regardless of that party's willingness to be associated with that candidate" constituted a severe burden on the political parties' associational rights. Pet. App. 3a-4a. The court rejected petitioners' assertions that I-872 established a "nonpartisan" blanket primary because "[b]y including candidates' self-identified political party preferences on the primary ballot, Washington permits all voters to select individuals who may effectively become the parties' standard bearers in the general election." Pet. App. 19a.

The court of appeals noted that the State and Grange argued that I-872 did not severely burden the parties' associational rights and never "articulated any compelling state interest" that would justify a severe burden. Pet.

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[2] The district court did not reach the Republican Party's claim that I-872 violates the Equal Protection Clause, concluding that the initiative impliedly repealed other provisions of state law that enabled each minor party to prevent more than one candidate for each office to appear on the primary ballot under its party name. Pet. App. 80a-84a. The court also did not reach claims that I-872 unconstitutionally restricted political party access to the ballot. Pet. App. 84a. In addition, the court reserved ruling on the political parties' "as applied" challenge. Pet. App. 53a.

App. 30a. Any compelling interests that could be implied were essentially the same as those rejected in *Jones* and could be served through alternative, more narrowly tailored provisions. *Id.* Like the district court, the court of appeals applied Washington's severance test, concluding "it cannot reasonably be believed" that I-872 would have been adopted absent the pervasive partisan identification provisions. Pet. App. 32a. The court rejected petitioners' argument that Washington voters intended to convert Washington's state and federal offices to "nonpartisan." Pet. App. 32a-33a.

Historical Development of Washington's Partisan Primary System

Since statehood, Washington's legislative branch and most executive branch offices have been "partisan" offices.[3] At the time of statehood, candidates for partisan office in Washington were nominated by party caucus or convention. Since statehood, the printing and distribution of election ballots has been controlled by the State. *See* 1889-90 WASH. LAWS, ch. XIII, p. 405, § 15. Washington's first legislature authorized parties to nominate by convention or primary, and to establish requirements for voter participation in the primary over and above the prerequisites for voting in general. 1889-90 WASH. LAWS, ch. XIII, p. 400, § 2; pp. 419-22, §§ 1-4, 6.

In 1907, Washington enacted legislation requiring nomination of candidates for public office by public primary. The statute recognized that absent the primary law,

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[3] Until 1907, the state Supreme Court was also a partisan office. 1907 WASH. LAWS, ch. 209, § 4. The state Superintendent of Public Instruction is nonpartisan. WASH. REV. CODE § 29.30.085(2) (2002); I-872, § 4(2), JA 412.

a political party had the inherent power to nominate as it saw fit. Although the primary law limited that authority, it reserved to the political parties "the power to . . . perform all other functions inherent to such organizations, the same as though this act had not been passed: *Provided*, That in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." 1907 WASH. LAWS, ch. 209, § 22.

The 1907 primary law was challenged based on adding voting qualifications to those set forth in Washington's constitution. Washington's Supreme Court upheld the law because a voter could be required to declare his intention "to affiliate with the party whose ballot he demands . . . and . . . to support generally the candidates of that party." *State ex rel. Zent v. Nichols*, 97 P. 728, 731 (Wash. 1908). The affiliation requirement did not add voting qualifications because "it is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. Being so, the qualifications of electors provided by the constitution for the general election can have no application thereto." *Id.*

In 1935, petitioner Grange sponsored an initiative to the legislature to implement a "blanket primary." The blanket primary allowed "all properly registered voters to vote for their choice at any primary election for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." *History of the Blanket Primary in Washington*, http://secstate.wa.gov/elections/bp_history.aspx (last visited July 17, 2007). After adoption in 1935, Washington used the blanket primary until 2004.

In 2000, this Court invalidated California's blanket primary in *Jones*. Much of the evidence on the operation and effect of the blanket primary was drawn from Washington, including testimony that 25% of party voters cross over to another party's primary and that two-thirds to three-quarters of all voters split their ticket in the primary, selecting the Republican standard bearers in some races and the Democratic standard bearers in others. There was also substantial evidence introduced regarding the adulteration of political party message resulting from the blanket primary. *See Jones*, 530 U.S. at 578-580.

The Republican Party has adopted rules for the qualification of candidates to file under the Republican name and concerning participation of voters in nominating Republican candidates. The rules in effect at the time this litigation commenced require that any primary that "has the effect of nominating a candidate of the Republican Party" must be limited to Republican and unaffiliated voters, and prohibit crossover voting in the primary. Rule 1, JA 89. In the absence of a qualifying primary to nominate Republican candidates, the rules provide for a nominating convention. Rule 16, JA 95. Only candidates certified or nominated by the Republican Party are authorized to designate themselves as Republican candidates or appear as Republicans "on the election ballot or in other election documents." Rule 30, JA 102.

Following *Jones*, the Ninth Circuit struck down Washington's prior blanket primary in *Reed*. The State defended the primary, asserting that it was a nonpartisan blanket primary as described in *Jones*. The *Reed* court stated:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries are the nominees not of the parties but of the

> electorate, that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204.[4] The Ninth Circuit held that "the Washington blanket primary system is materially indistinguishable from the California blanket primary system" held unconstitutional in *Jones*." *Id.*

In 2004, Washington's legislature adopted a "modified" blanket primary. E.S.B. 6453, 58th Leg., Reg. Sess. (Wash. 2004), JA 425-579. The bill included an alternate Montana-style open primary, to be effective if a court invalidated the modified blanket primary. JA 489. On April 1, 2004, Washington's governor partially vetoed the legislation, noting that the modified blanket primary would substantially restrict voter choice at the general election, in which voter participation was approximately double that of the primary election. JA 574-75. The governor also concluded that the "top two" component of the modified blanket primary would "effectively den[y] [minor parties] access to the general election ballot." JA 575. That same day, petitioner Grange issued a press release launching the campaign for I-872 "in response to Gov. Locke's partial veto of Engrossed Senate Bill 6453, which . . . would have put a top-two system in place." JA 798. The Grange described I-872 as instituting "a '*modified*' blanket primary system . . . in which *voters will not be restricted to choosing among the candidates of only one party* in a primary election." *Id.* (emphasis added).

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[4] In this case the State similarly asserts that "candidates who appear on the general election ballot are selected by the *voters at large*, not by the parties or by the voters as party members." JA 388 (emphasis in original).

SUMMARY OF ARGUMENT

Political parties have the First Amendment rights to define the scope of their political association, select their standard bearers for the general election, and exclude outsiders from that process. I-872's plain language violates those rights, declaring that every voter has a "fundamental right" to select party standard bearers "without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3), JA 411. This Court rejected the "desire" to select standard bearers of a party to which a voter does not belong as a "right," ruling that it "falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest," and provides no "basis for disregarding the First Amendment right to exclude." *Jones*, 530 U.S. at 573 n.5. I-872 further violates core rights of political association by forcibly associating the Republican Party on the State's election ballots with any candidate who self-selects the Republican Party as his "preference."

Washington's modified blanket primary unquestionably selects the Republican Party's standard bearers for the general election. It is the only partisan nomination process the State recognizes. JA 104-111. It forces the Republican Party to associate on the ballot with any candidate who seeks to appropriate the Party's name. I-872, § 4 (candidate name must be listed "in conjunction" with the Republican Party), JA 412. It forces the Republican Party to have its standard bearers selected by voters who do not share the party's policies or principles. *Id.*, § 5, JA 412.

Petitioners cannot avoid the real world association I-872 creates between candidates and the political party for which they express "preference." Washington defends I-872 as advancing the interests of voters who "may wish

to support a variety of candidates for different offices who may be *associated with two or more parties.*" State Br. at 29-30 (emphasis added). The Grange likewise admits the connection between party and candidates: under I-872, "we could even see more *minor party candidates* for legislative offices." JA 66 (emphasis added). At the general election, "the voter might be presented with a choice . . . between two candidates *of the same political party.*" JA 170 (emphasis added).

I-872 clearly intended to overrule the fundamental holding of *Jones* and constitutes nothing less than an effort at legislative nullification of this Court's First Amendment precedents. Its declaration of "legislative intent" even invokes the old, unconstitutional blanket primary as a system that "allow[s] the broadest possible participation in the primary election; . . . giving each voter a free choice among all candidates in the primary." I-872, § 2, JA 411. Referring to *Reed*, I-872 further states: "The Ninth Circuit Court of Appeals has threatened [the blanket primary] system through a decision, [sic] that, if not overturned by the United States Supreme Court, may require change." *Id.* In its press release announcing the I-872 campaign, the Grange explained that its "initiative will put a system in place which *looks almost identical* to the blanket primary system we've been using for nearly 70 years." JA 798 (emphasis added).

This Court has previously faced legislative sleight-of-hand in varied contexts: the "White primary" cases, a state statute that provided "information about candidate race," term limits, and declarations of secular purpose regarding religious instruction in public schools. In every instance, the Court rejected legislative evasions of constitutional protections, whether by functionally identical, racially

exclusive primaries or sham assertions of legislative purpose.

I-872, by both express intent and operation, selects the candidates who will carry the Republican Party's standard and message to Washington's voters in the general election. I-872 impermissibly shifts the ability to define the scope of the Republican Party's political association away from the Party to any candidate who wants to appropriate the Republican Party name to advance his candidacy, and to unaffiliated and rival-party voters. In each instance, I-872 violates the Party's First Amendment right to define the scope of its political association at the critical juncture of selecting its standard bearers for the general election. The rules adopted by the Republican Party governing candidate eligibility and prohibiting crossover and rival-party voting in the primary are designed to advance its policies and programs. This Court's precedents clearly prohibit a state from forcing inclusion of potentially adverse persons or messages in an expressive association.

ARGUMENT

1. Washington's modified blanket primary imposes a severe burden on core First Amendment rights of political association by denying the Republican Party the ability to define the scope of its political association at the critical juncture when its standard bearer for the general election is chosen.

The First Amendment protects "the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association

to those people only." *Jones*, 530 U.S. at 574 (internal quotation marks and citations omitted). This freedom is an indispensable element of representative democracy. *Id.* From statehood, Washington's political parties have filled this critical role by promoting policies, recruiting candidates, and mobilizing voters. *See, e.g.*, CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 66 (Univ. Wash. Press 1988).

Selecting a candidate to advance a political party's program for governance is its fundamental purpose. This Court has consistently held that "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences,'" *Jones*, 530 U.S. at 575 (internal citation omitted), is "the 'basic function of a political party.'" *Id.* at 581 (internal citation omitted). "There is simply no substitute for a party's selecting its own candidates." *Id.* at 580-81. I-872 forces the Republican Party to associate on the primary and general election ballots with any candidate who expresses a "preference" for the Party, even when the Party may not "prefer" that candidate. *See* I-872, §§ 4, 7(3), 9(3), JA 412, 414-15.

This Court made clear that the First Amendment precludes a state from substituting its judgment for the party's in selecting the party's standard bearer for the general election.

> Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "selects a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489 U.S. at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the

> crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216; *see also id.* at 235-236 (Scalia, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom"); *Timmons*, 520 U.S. at 359 ("The New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omitted)); *id.* at 371 (Stevens, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

Jones, 530 U.S. at 575-76.

A political party's candidate is its "ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. The Republican Party's programs for governance may only be implemented by electing candidates who adhere to its principles and programs. This Court has also recognized the symbiosis between party positions and party candidates. The nomination "process often determines the party's positions on the most significant public policy issues of the day." *Id.* It is for those reasons that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* "There is no question about the closeness of candidates to parties. . . ." *FEC v. Colo. Republican Fed. Campaign Comm'n*, 533 U.S. 431, 449 (2001).

Washington's modified blanket primary shares the same goal as California's blanket primary – changing the identity of the Republican Party's standard bearer, and thereby its message. The promoters of the California

blanket primary described it as a "a measure that would weaken party hard-liners and ease the way for moderate problem-solvers." *Jones*, 530 U.S. at 569 (internal quotation marks omitted). The Grange explained I-872's intent to change both the Republican message and messenger. I-872 would be

> more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists. . . . The qualifying primary gives voters the kind of control that they exercised for seventy years under the blanket primary.

JA 78-79. The official Voters' Pamphlet confirmed that "[p]arties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters," JA 406, and that "I-872 will restore the kind of choice in the primary that voters enjoyed for seventy years with the blanket primary." JA 407. These objectives do not justify the intrusion of I-872 on the freedom of political association to which the parties are entitled. The State has no business trying to promote candidates favored by the broad middle any more than promoting leftist or rightist candidacies. A party has a constitutional right to take positions or promote candidates that may be unpopular at the moment, but in which the party believes. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28 (1989).

The modified blanket primary is unconstitutional for the same reason as the blanket primaries in *Jones* and *Reed* – it deprives Republicans of control over the identities of their standard bearers and the content of their message.

a. I-872's modified blanket primary is a partisan primary that selects the Republican Party standard bearers for the general election.

I-872's modified blanket primary is expressly a partisan nominating process that selects the Republican Party standard bearers for the general election. I-872 is not the nonpartisan blanket primary discussed in *Jones* because it resolves intraparty competition in a state-mandated primary. The State has admitted that the modified blanket primary selects political party standard bearers, describing the presence of two self-designated Republicans in the general election as "politically interesting, both for Republicans and for Democrats (who have no standard bearer in such an election)." JA 392.

The State now argues that I-872 does not select party standard bearers in the general election because there may be two Republicans and no Democrats on the general election ballot. State Br. at 43. I-872 still nominates Republican standard bearers, even if in some races it may nominate two. There is no constitutional distinction between rival-party voters nominating one, two or more Republican candidates. Washington's constitution recognizes that a party may have more than one nominee for office. *See* WASH. CONST. art. II, § 15 (permitting the Republican Party to "*nominate*" three candidates to fill a vacancy in partisan office that had been held by a Republican).

Operationally, I-872 is indistinguishable from Washington's former blanket primary, as its sponsors intended. The sponsor announced that I-872 would "*preserve* [Washington's] primary system." JA 792 (emphasis added). It would look and operate much like the former blanket primary. JA 68-69, 77 (I-872 "establishes a qualifying primary which will give voters the freedom they enjoyed

under the blanket primary – to vote for any candidate they prefer for each office"). I-872 is not a nonpartisan blanket primary. It is the old, unconstitutional blanket primary repackaged with a different name, "[a]n old pattern in new guise." *Terry v. Adams*, 345 U.S. 461, 480 (1953) (Clark, J., concurring) (invalidating "Jaybird primary" which continued practice of excluding voters based on race).

Under Washington law, I-872 must be viewed in its statutory context. "A court's objective in construing a statute is to determine the legislature's intent." *Tingey v. Haisch*, 152 P.3d 1020, 1023 (Wash. 2007). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* (alteration in original) (internal quotation marks and citation omitted). Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id.* If the statutory language remains susceptible to more than one reasonable interpretation, the statute is considered ambiguous, and the court may then employ statutory construction tools, including legislative history, for assistance in discerning legislative intent. *Id.*

Political party affiliation permeates I-872. Eight of its eighteen sections address candidates' "party preference" or affiliation. I-872, §§ 3, 4, 5, 7, 9, 11, 12, 15, JA 411-12, 414-15, 417, 419. The definition of "primary election" expressly recognizes that both candidates and voters have "party preference or affiliation." *Id.*, § 5, JA 412. The partisan identification selected by a candidate is "for the information of voters." *Id.*, § 7(3), JA 414. If a candidate selects the Republican Party as his "party preference," the Party name must appear "in conjunction with" the candidate on

both the primary and general election ballots. *Id.*, § 4, JA 412. The importance of the party affiliation features is buttressed by the State's emergency regulations that prohibit a candidate from changing "party preference" between the primary and general election. WASH. ADMIN. CODE 434-230-040 (2005), JA 601.

I-872 substitutes "preference" for "designation" in the candidate filing statute. *Id.*, § 9(3), JA 415. Petitioners contend that a candidate's "party preference" connotes no affiliation or association with a political party, but rather has a special, limited meaning. State Br. at 23-24; Grange Br. at 38-39. I-872 contradicts this assertion, recognizing that candidates elected as Republicans are "of" the Republican Party: "If a vacancy occurs in any legislative office . . . , the term of the successor who is *of the same party* as the incumbent may commence. . . ." I-872, § 15(2) (emphasis added), JA 419. The assertion that "party preference" has a special meaning is further undercut by I-872's use of "preference" interchangeably with "status" and "designation" in connection with "independent" candidates. *Compare id.*, § 7(3) ("independent preference") *with id.*, § 9(3) ("independent status"), § 11 ("independent status"), and § 12 ("independent designation"), JA 414-15, 417. "Where . . . a statute fails to define a term, rules of statutory construction require us to give the term its plain and ordinary meaning, which we derive from a standard dictionary if possible." *McClarty v. Totem Elec.*, 137 P.3d 841, 849-50 (Wash. 2006). The common, dictionary meaning of "preference" is "1a. The selecting of someone or something over another or others. b. The right or chance to so choose. c. Someone or something so chosen. See synonyms at choice." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). "Party preference" is "party selection" or "party choice" and is functionally

identical to "party designation."[5] The Grange itself treated the terms "preference" and "designation" as interchangeable and a continuation of past practice in its campaign for I-872: "[C]andidates will *continue* to express a political party *preference* when they file for office and that *designation* will appear on the ballot." JA 169 (emphasis added).

I-872's partisan primary was grafted onto a wider body of law under which "Republican" candidates are representatives of the Republican Party. For example, Washington's Constitution recognizes the association between successful Republican candidates and the Republican Party. It authorizes the Party to nominate the successors to public officers elected under the Republican banner:

> [T]he person appointed to fill the vacancy must be from . . . the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party. . . .

WASH. CONST. art. II, § 15. "Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." WASH. REV. CODE § 29A.04.086 (2006). A legislator's ability to raise campaign money depends, in part, on being one of the "members of a major political party in the state senate

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[5] Other election-related statutes use "preference" and "designation" as equivalents. *See, e.g.*, WASH. REV. CODE § 42.17.510(1) (2006) ("For partisan office, if a candidate has expressed a party or independent preference on the declaration of candidacy, that party or independent designation shall be clearly identified in electioneering communications, independent expenditures, or political advertising.").

or state house." WASH. REV. CODE § 42.17.020(10) (2006); *see also* WASH. REV. CODE § 42.17.640 (2006). Before the primary, local election officials are required to publish notice of the election, which must contain "the proper party designations" of the candidates. WASH. REV. CODE § 29A.52.311 (2006).

A candidate who appears on the general election ballot as a Republican is to the public, inevitably, the Party's standard bearer. It is immaterial that I-872 avoids using the terms "nominate" or "nominee." In *Jones*, the Court used interchangeably the phrases "selecting a candidate," "selecting a nominee," "selecting a standard bearer," and "choosing a leader." According to the State, I-872 does not "choose a party's nominee" because it separates "the process of choosing party candidates from the process of winnowing the field of candidates who can participate in the general election." State Br. at 30; *see also id.* at 38, 41. The initiative, however, is the only mechanism for "winnowing" the field of potential Republican standard bearers to the candidates who represent the Party and its programs to the electorate in November. State election officials admitted that under I-872, there is no "partisan nomination process separate from the primary." JA 104-11.

This case is not the first time the State has argued that Washington's primary election system is nonpartisan or does not select party nominees. It is the third, and the argument has been rejected both times before. In its *amicus curiae* brief before this Court in *Jones*, the State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as *Amicus Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. In *Reed*, the

State argued that Washington's prior blanket primary was the nonpartisan primary of *Jones* and distinguishable from California's invalidated primary:

> First, California registers voters by party but Washington does not. Second, . . . because of its non-partisan registration, the winners of the primary "are the 'nominees' not of the parties but of the electorate." Thus, . . . its primary is a "*nonpartisan* blanket primary" that under *Jones* does not violate the parties' associational rights.

Reed, 343 F.3d at 1203 (internal citations omitted) (emphasis in original). The Ninth Circuit characterized these as "distinctions without a difference," *id.*, and observed:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204 (internal citation omitted).

The modified blanket primary is a partisan nominating process that follows the former blanket primary in "prevent[ing] a party from picking its nominees." Voters of any political party, including those antagonistic to the Republican Party, remain free to vote for candidates identified as Republican on the ballot and determine which Republican candidates advance to the general election. This directly contravenes the Republican Party's rules, which limit participation in "any primary which has the effect of nominating a candidate of the Republican Party" to voters who affirmatively affiliate by requesting a Republican ballot. Rule 1, JA 89. I-872 authorizes opportunistic or hostile candidates to use the Republican Party

name to advance their candidacies, whether or not they share the principles of the Party.

The participation of hostile voters is the precursor harm. The greater harm is saddling the Republican Party with a standard bearer who does not share its values. "[A] single election in which the party nominee is selected by nonparty members could be enough to destroy the party. . . . Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it." *Jones*, 530 U.S. at 579.

b. Washington's candidate filing statute impermissibly shifts the ability to define the Republican Party's political association away from the Party to any candidate who chooses to associate the Republican Party with him on the ballot.

The modified blanket primary allows any candidate to declare himself a "Republican" and forces the Republican Party to associate with every candidate who wants to use the Republican Party name to advance his candidacy. *See* I-872, § 4, JA 412. The association of candidate and party under I-872 cannot be avoided by verbal sleight-of-hand – the State lists both real Republican candidates and those expressing a "preference" for the Party as Republicans. *Id.*, § 4 (primary and general election ballots), JA 412; § 11 (State Voters' Pamphlet), JA 417. The state attorney general's official description of I-872 makes no distinction between candidates expressing a "party preference" and "real" party candidates. They are all "party candidates": "The primary ballot would include . . . major party and minor party candidates and independents." JA 405. Under

Republican Party rules, only candidates certified to a qualifying party primary or candidates nominated by convention in the absence of a party primary may appear on the ballot or in election documents under the Republican Party's name. Rule 30, JA 102. Forced association between a candidate and the Party on official ballots or other publicly-funded election materials is no less a violation of the Party's First Amendment right to exclude than is forced association with voters.

It is essential that the Party be able to exclude candidates who are hostile or indifferent to its principles at the "moment of choosing the party's nominee, [which] is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Jones*, 530 U.S. at 575 (internal citation omitted). Because the nominee "becomes the party's ambassador to the general electorate," a state's regulation of "the identity of the party's leaders . . . may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Jones*, 530 U.S. at 575, 579 (internal quotation marks and citation omitted).

This Court has repeatedly declared that a state cannot compel a group to associate with other speech or speakers. *See, e.g., Pacific Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). *Pacific Gas* struck down California's requirement that a private company, which discussed political issues in newsletters sent with its monthly billing envelopes, provide access to its envelopes for a third party's political speech. A plurality of the Court stated that "[c]ompelled access . . . both

penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." 475 U.S. at 9. California's order to disseminate the third-party's speech "in envelopes that [the company] owns and that bear [its] return address," *id.* at 18, forced "association with speech with which [the company] may disagree." *Id.* at 15.

In *Hurley*, Massachusetts asserted that its public accommodation law required a private parade organizer to include a gay, lesbian, and bisexual group in a St. Patrick's Day parade. The Court held that compelling the group's inclusion "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573.

Similarly, the Court ruled the Boy Scouts could not be forced to include a homosexual activist as an assistant scoutmaster in *Dale*. Giving deference to an association's view of what would impair its expression, the Court recognized that the activist's "presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior," 530 U.S. at 653, "a point of view contrary to its beliefs." *Id.* at 654.

"'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (emphasis in original; internal citation omitted) (quoting *Pacific Gas*, 475 U.S. at 11, 16). I-872 compels the Republican Party to associate publicly with any candidate who "prefers" the Republican label. It thereby forces the Party to either alter its speech to distinguish

between "true" and "sham" Republican candidates or remain silent at the risk of losing control over its message. Because the Republican Party is "conjoined with" all "Republican" candidates, *see* I-872, § 4, JA 412, including those who do not share its core values, its autonomy to choose the content of its message is compromised. *See Hurley*, 515 U.S. at 576. I-872 impairs the efficacy of even the simplest messages to the Republican Party's core constituency, such as "Vote Republican," if the State lists two candidates on the general election ballot as "Republican." Furthermore, Washington law requires that all political advertising regarding partisan office identify the party of the candidate. WASH. REV. CODE § 42.17.510(1) (2006).[6] Republican Party speech disavowing a candidate who claimed a "preference" for the Republican Party would still have to identify that candidate as a "Republican."

The Court explained its compelled speech cases in *Rumsfeld v. Forum for Academic & Inst'l Rights*, 547 U.S. 47, 126 S. Ct. 1297 (2006). The "compelled-speech violation[s]" in *Hurley* and *Pacific Gas* "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 126 S. Ct. at 1309. The Court explained that in *Dale*, the Boy Scouts' First Amendment right of expressive association was violated by the forced inclusion of a leader whose "message" ran counter to that of the association. *See id.* at 1312. Similarly, forcing unwanted messages and messengers on the Republican Party by inclusion of sham or

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[6] The statute in effect at the time this lawsuit was filed provided, in relevant part: "The party with which a candidate files shall be clearly identified in political advertising for partisan office." WASH. REV. CODE § 42.17.510(1) (2004). The current statute became effective January 1, 2006. *See* S.B. 5034, 59th Leg., Reg. Sess. (Wash. 2005).

rejected Republican candidates impairs the Party's ability to define and promote its message.

None of this Court's prior decisions even hint that a candidate may invoke the First Amendment to hijack a party's name. Courts facing attempted hijackings by candidates have resoundingly affirmed a political party's right to determine who may – and who may not – associate with it. This Court recognizes that both states and parties may act to require pledges of support for a party from candidates seeking to affiliate with a party in a primary. "A state's *or a political party's exclusion of candidates from a party primary* because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." *Ray v. Blair*, 343 U.S. 214, 227 (1952) (emphasis added).

In *Duke v. Massey*, 87 F.3d 1226, *reh'g en banc denied*, 98 F.3d 1355 (11th Cir. 1996), David Duke expressly claimed a First Amendment right to associate with the Republican Party. The court upheld the Party's right to reject Duke as a candidate because Duke did not have "the right to associate with an 'unwilling partner'" and his "interests [did] not trump the Republican Party's right to identify its membership based on political beliefs." *Id.* at 1232-34. *See also Duke v. Cleland*, 954 F.2d 1526, 1531 (11th Cir.), *cert. denied*, 502 U.S. 1086 (1992) ("Duke has no right to associate with the Republican Party if the Republican Party has identified Duke as ideologically outside the party.").

In *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the court described the severe burden that a forced association with candidates places upon a political party:

> [T]he Party's interest is not merely legitimate. Here, the associational rights of the Democratic National Party are at their zenith. The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself. . . .
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> * * *
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> . . . . By narrowing the field of those who represent it, the Party seeks to define its values, distinguish them from those of its competitors, and thereby attract like-minded voters. At the same time, it seeks to prevent confusion among those voters by excluding from its list of potential presidential nominees those who do not share those values. . . .
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> * * *
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> [The Party is not] required to accept LaRouche's selfdesignation [sic] as the final word on the matter. Rather, the Party's "freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'"

Id. at 995-97 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). The underlying principle is mutuality of association.

LaRouche and the *Duke* cases are consistent with this Court's approach in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) and *Clingman v. Beaver*, 544 U.S. 581 (2005). *Timmons* upheld Minnesota's law prohibiting an individual from appearing on the ballot as the candidate of more than one party. The Court noted that the New Party was free to try to persuade the candidate in question to run under its banner rather than associate on the ballot with another party. 520 U.S. at 360. However,

the New Party could not use the First Amendment to force an unreciprocated association with a candidate on official state ballots, where the candidate chose to be the nominee of a different party.[7] In *Clingman*, the Court ruled that voters who affirmatively affiliated with rival parties did not have a First Amendment right to vote in Libertarian primaries, unless they made their association mutual or at least were willing to forego their association with a rival party by declaring themselves independents. 540 U.S. at 592. *LaRouche* and the *Duke* cases simply apply the same principle to situations where a political party has chosen to associate with another candidate.

Washington has also recognized that candidates do not have an unlimited right to use any party name they please on the State's official ballots. *See State ex rel. LaFollette v. Hinkle*, 229 P. 317 (Wash. 1924) (enjoining State from printing names of candidates under "LaFollette State Party" name without the consent of LaFollette). The court of appeals adhered to these principles when it concluded that I-872's forced "association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights." Pet. App. 25a. A candidate who "prefers" the Republican Party is free to seek the

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[7] *Timmons* also rejected the argument now advanced by the Grange that non-Republican candidates have a "free speech" right to require the listing their party preference on the ballot. *See* Grange Br. at 19. Rejecting the New Party's claim of a right to use the ballot to express its general support for a candidate who was not its nominee, the Court stated that "[b]allots serve primarily to elect candidates, not as fora for political expression." 520 U.S. at 363. Under *Hurley*, the Republican Party *does* have a First Amendment right to keep the State of Washington from forcibly including outsiders marching under the Republican banner in the primary.

Republican nomination, but cannot appropriate the name if the Party selects another standard bearer.

This Court has acknowledged that "to the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian*, 479 U.S. at 220. In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit struck down Ohio's election statute that prohibited non-party candidates from using the designation "Independent" next to their names on the ballot. The court relied in part on the value of party labels. *See id.* at 172-73. For example:

> [P]arty candidates are afforded a "voting cue" on the ballot in the form of a party label which research indicates is the most important determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth.

Id. at 172.

From statehood, party labels in Washington have implied "[a]dherence to certain principles and policies" and thus provided meaningful guidance to voters. SHELDON, *supra* at 67. The Grange admits the candidate's party preference creates a link between the candidate's message and that of the Republican Party. *See* Grange Br. at 21-22. The 1991 Louisiana gubernatorial election involving arch-segregationist David Duke, made infamous by the opposition's bumper sticker, "VOTE FOR THE CROOK: IT'S IMPORTANT," illustrates the association in the public's mind between candidates and the party whose name they

carry, whether the candidate is the party nominee or simply "prefers" that party.[8] *See* Michael Riley, *Louisiana: The No-Win Election,* TIME, Nov. 25, 1991, *available at* http://www.time.com/time/printout/0,8816,974345,00.html (last visited July 11, 2007). In this case, the State attempts to adulterate the "voting cue" provided to voters by allowing any candidate to appropriate the label "Republican," whether that candidate supports or opposes the political philosophy of the Republican Party and its adherents.[9]

The Republican Party name has meaning and electoral value:

> . . . Parties are known by names . . . which distinguish and differentiate the various parties in the public mind. The name "Democratic" is an important distinguishing mark of the party which carries that appellation, as "Republican" . . . [is] of [an]other similar large organized group[] of voters. Through custom and usage certain rights attach to the use of a party name and emblem.

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[8] Under Louisiana's form of a "top two" primary, when former Governor Edwards filed as a Democrat and a Republican congressman, the Republican governor, and arch-segregationist David Duke filed as Republicans, the crossover vote allowed Duke to edge out the two candidates supported by the Republican Party.

[9] The State's emergency regulations provide further evidence of the association established between candidate and party by party identification on the ballot. WASH. ADMIN. CODE § 434-230-040 (2005) prohibits a candidate from changing his "party preference" between the primary and general elections. JA 601. If the purpose of listing "party preference" is merely for the candidate to provide information to voters, voters should be made aware of any change in the candidate's preference, especially if the change occurs between the primary and general elections.

> It is a matter of common knowledge that in campaigns at general elections such terms as "Democrat," "Democrats" and "Democratic" have been used for such a length of time as to render their beginnings almost in "time out of memory" to connote the Democratic Party, its members and candidates. The same observation is equally true of "Republican," "Republicans" and "Republican Party."

Plonski v. Flynn, 222 N.Y.S.2d 542, 544-45 (1961) (quoting *Chambers v. Greenman Ass'n*, 58 N.Y.S.2d 637, 641 (1945)).

Washington recognizes "the right to the exclusive use of an established name" for non-commercial associations. *Most Worshipful Prince Hall Grand Lodge v. Most Worshipful Universal Grand Lodge*, 381 P.2d 130, 140 (Wash. 1963). "The underlying concept is that of unfair competition in matters in which the public generally may be deceived or misled." *Id.* at 135. Under *Grand Lodge*, the unauthorized use of a name that is identical to or indistinguishable from an established name causes confusion and diverts support from the legitimate organization. *Id.* at 136. Recognizing the value of party labels, I-872 acknowledges that candidates will be "trading" on the reputation and name of the Republican Party. It expressly states that party labels are "for the information of voters." I-872, § 7(3), JA 414. The "information" is no more and no less than an association of the candidate with the Republican Party's philosophy and positions.[10]

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[10] It is no defense that voters might be able to discern from other sources which candidates carrying the Republican Party name on state ballots are the Party's candidates and which have merely appropriated its name. Petitioners do not dispute the lower courts' conclusions

(Continued on following page)

The self-designation of candidates under I-872 coupled with the "top two" requirement also severely burdens the Republican party by creating an unreasonably high threshold for general election ballot access. In order to assure advancement to the general election under a "top two" primary, the Republican Party nominee must obtain more than one-third of the total primary vote. The actual required percentage for general election ballot access for any given primary for any given office will be a moving target.[11] The presence of multiple candidates, each listed as "Republican," poses a risk of voter confusion and dilutes support for the Party's nominee. The ability of candidates to unilaterally associate themselves with the Republican Party interferes with the Party's ability to marshal support for its nominee and finish in the top two.

The risk of vote-fracturing is real. In the only convention conducted before I-872 was declared unconstitutional, the unsuccessful candidate for the Republican nomination declared his intention to file as a Republican anyway.

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regarding the importance of candidates' ballot designations in electoral behavior. *See* State Br. at 48-49, Grange Br. at 19, 21-22 & n.4. This Court recently declined to make a sweeping assumption that voters possess great sophistication, noting that during the 2000 elections, 85% of surveyed voters could not name even a single candidate for the U.S. House of Representatives in their district. *See FEC v. Wisc. Right to Life, Inc.*, 168 L. Ed. 2d 329, 347 n.6 (2007). In contrast, party identification on the ballot has great impact on voter behavior: "Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting. . . . [T]he tendency to vote according to party loyalty increases as the voter moves down the ballot to lesser known candidates seeking lesser known offices at the state and local level." *Rosen*, 970 F.2d at 172.

[11] For example, in a primary with six candidates, who divide the vote approximately equally, general election ballot access could be obtained with approximately 17% of the total primary vote.

JA 362-63. In 1980, there was a large Republican field in the gubernatorial primary. The eventual governor, John Spellman, would not have appeared on the general election ballot had I-872 been in effect. Instead, two Democrats would have appeared on the general election ballot. JA 408-09.

The 1996 gubernatorial primary in which the Republican vote was widely fractured provides a more recent example of the potential consequences of I-872. JA 368. Although eight Republican candidates garnered nearly 48% of the total primary vote, the Republican nominee in the primary obtained only 15.26% of the vote, behind the top two Democratic candidates. JA 665. Under I-872, the Republican Party would have had no candidate in the general election. Likewise, the Republican Party would not have had a candidate for lieutenant governor on the 1996 general election ballot. The top Republican vote-getter received 19.43% of the primary vote, less than the top two Democratic candidates. *Id.* These percentages show substantial strength well above the "modicum" of support which states may require to obtain general election ballot access. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). Should seven Republican candidates equally divide seventy percent of the primary vote and two Democrats evenly divide thirty percent, I-872 would place the two Democrats on the general election ballot.

Laws that create unreasonable obstacles to ballot access violate associational rights under the First Amendment. "Restrictions upon the access of political parties to the ballot impinge upon the rights of individuals to associate for political purposes, as well as the rights of qualified voters to cast their votes effectively, and may not survive scrutiny under the First and Fourteenth Amendments."

[graphic of Washington state omitted]

County Results List

County	Yes (Voters/Percentage)	No (Voters/Percentage)
Adams	**3,365**	**1,504**
	69.11%	30.88%
Asotin	**5,385**	**2,993**
	64.27%	35.72%
Benton	**39,745**	**24,233**
	62.12%	37.87%
Chelan	**18,339**	**9,946**
	64.83%	35.16%
Clallam	**21,344**	**13,495**
	61.26%	38.73%
Clark	**93,703**	**63,618**
	59.56%	40.43%
Columbia	**1,410**	**631**
	69.08%	30.91%
Cowlitz	**27,533**	**13,044**
	67.86%	32.13%
Douglas	**8,355**	**4,460**
	65.19%	34.80%

Ferry	**2,150**	**1,084**
	66.48%	33.51%
Franklin	**10,413**	**5,271**
	66.39%	33.60%
Garfield	**760**	**482**
	61.19%	38.80%
Grant	**16,235**	**8,581**
	65.42%	34.57%
Grays Harbor	**19,501**	**7,570**
	72.03%	27.96%
Island	**21,533**	**15,002**
	58.93%	41.06%
Jefferson	**10,273**	**7,667**
	57.26%	42.73%
King	**467,015**	**383,913**
	54.88%	45.11%
Kitsap	**68,267**	**46,779**
	59.33%	40.66%
Kittitas	**9,813**	**5,649**
	63.46%	36.53%
Klickitat	**5,068**	**3,754**
	57.44%	42.55%
Lewis	**19,654**	**11,131**
	63.84%	36.15%

Lincoln	**3,545**	**1,913**
	64.95%	35.04%
Mason	**16,002**	**8,360**
	65.68%	34.31%
Okanogan	**9,795**	**5,689**
	63.25%	36.74%
Pacific	**6,549**	**3,322**
	66.34%	33.65%
Pend Oreille	**3,958**	**1,997**
	66.46%	33.53%
Pierce	**185,586**	**112,852**
	62.18%	37.81%
San Juan	**5,082**	**4,554**
	52.73%	47.26%
Skagit	**29,953**	**20,418**
	59.46%	40.53%
Skamania	**2,960**	**1,906**
	60.83%	39.16%
Snohomish	**171,974**	**111,603**
	60.64%	39.35%
Spokane	**126,174**	**70,630**
	64.11%	35.88%
Stevens	**12,331**	**7,011**
	63.75%	36.24%

Thurston	**65,193**	**42,155**
	60.73%	39.26%
Wahkiakum	**1,525**	**592**
	72.03%	27.96%
Walla Walla	**14,133**	**7,650**
	64.88%	35.11%
Whatcom	**50,171**	**33,913**
	59.66%	40.33%
Whitman	**9,849**	**7,168**
	57.87%	42.12%
Yakima	**47,564**	**22,650**
	67.74%	32.35%
Total	**1,632,225**	**1,095,190**
	59.84%	40.15%

Results last updated on: 12/23/2004 3:52:00 PM

EXHIBIT L

ELECTION LAW IN WASHINGTON

[picture omitted]

Learn how to defend the principles and procedures underlying the democratic process.

TUESDAY, JUNE 21, 2005

Sponsored By:
The Northewst Legal Foundation
818 South Yakima Avenue, Suite 200
Tacoma, WA 98504

Approved for 6.0 CLE Credits for Washington Attorneys: 5. General CLE Credits and .75 Ethics Credit

ELECTION LAW IN WASHINGTON

Learn how to defend the principles and practices underlying the democratic process

SCHEDULE

8:00 a.m. – Check-In • Walk-In Registration • Distribution Of Course Books • Coffee, Tea, Juice and Pastry Service

8:45 – 9:30	**INTRODUCTION TO ELECTION SYSTEMS** **Professor Todd Donovan** – *Professor in the Political Science Department at Western Washington University, published dozens of academic articles, including several on initiatives, and has co-authored several books. Tod's primary academic expertise is in the areas of direct democracy, election systems, and representation.*
9:30 – 10:15	ELECTION TECHNOLOGIES AND MECHANICS Ms. Pat McCarthy – *Elected Pierce County auditor 2003 to Present. Certified Elections/ Registration Administrator-Auburn University-August 2002 Legislative Co-Chair of Washington State Association of County Auditors*
10:15 – 10:30	Break
10:30 – 11:15	UPDATE ON HAVA AND OTHER FEDERAL ELECTION LAWS Mr. Nick Handy – *Current Director of Elections in the Office of Secretary of State. Appointed in May 2004, Mr. Handy served as Elections Director through the 2004 general election. Mr. Handy is an attorney with thirty years experience working in state and local government, including fourteen years in the Washington State Attorney General's Office where he served as Deputy Attorney General.*

11:15 – 12:00	UPDATE ON WASHINGTON STATE ELECTION LAWS Ms. Katie Blinn – *Assistant Director of Elections for the Office of the Secretary of State and oversees the Secretary of State's Certification and Training Program. Prior to coming to the Secretary of State's office, Katie worked for four years as nonpartisan staff counsel at the Washington State House of Representatives and the Pierce County Prosecutor's Office.*
12:00 – 1:15	Lunch On Your Own
1:15 – 2:00	ELECTION ETHICS Professor John Strait – *Associate Professor of Law, Seattle University School of Law – graduate of Yale Law School; has taught, researched and written in the field of professional responsibility and legal malpractice since 1976.*
2:00 – 2:45	POLITICAL PARTIES: THEIR LEGAL ROLE IN ELECTIONS Mr. John White – *Principal at the Kirkland law firm, Livengood, Fitzgerald & Alskog, PLLC. He is outside general counsel to the Washington State Republican Party, and has represented individuals and organizations in connection with election and campaign finance law since the early 1990s. His practice focuses primarily on business, tax and estate planning matters.*
2:45 – 3:00	Break
3:00 – 3:45	ELECTION CONTESTS AND RECALLS Mr. David McDonald – *Senior litigation partner at Preston Gates & Ellis in Seattle, WA. Since 1992, he has represented the State of Washington at the Democratic national Committee. Since January 7, 2005, he has also served as the Contest Manager for the Washington State Democratic Party.*

3:45 – 4:30	PANEL DISCUSSION – RESTORING VOTER CONFIDENCE IN PUBLIC ELECTIONS or "ARE ELECTIONS TOO IMPORTANT TO LEAVE TO ELECTIONS OFFICIALS?" Prof. Todd Donovan • Mr. Nick Handy • Mr. David McDonald • Mr. John White Other panelists may participate.
4:30 pm	Complete Evaluation Forms • Adjorn

[1]

Political Parties: Their Legal Role in Elections

By Richard Derham and John White[1]

I Political Parties and Representative Democracy

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. [2]

Modern style political parties are, like the nation itself, largely the creation of the men who framed our constitution. As the Supreme Court statement quoted above notes, political parties organized around ideas and philosophy are essential to representative government.

It was not always so. James Madison's warning about the dangers of faction[3] grew out of the 16th and 17th Century English experience, replicated in some colonies, where narrow interests, frequently of the job-seeking variety, become the dominant factor

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[1] Mr. Derham is retired from Davis Wright Tremaine, where he practiced for 30 years. He served as legal counsel, Washington State Republican Party, 1976-1983.1992-1996, and as Chairman, King County Republican Central Committee, 1991-92.

Mr. White is a principal with the Kirkland firm Livengood, Fitzgerald & Alskog, PLLC. The has served as general counsel to the Washington state Republican Party since 1997, and as counsel to the King County Republican Central Committee (1991-1996). His practice includes representing individuals and

organizations on election and campaign finance law matters. The opinions expressed herein are personal and do not represent the views of anyone but the authors.

The authors express appreciation to Richard Shepard for his assistance in researching the law relating to third parties.

[2] California Democratic Party v Jones, 530 U. S. 567, 574 (2000).

[3] Federalist Papers, Number 10.

* * *

[24]

* * *

4. Implications for a "Top Two" System.

Voters in Washington State in 2004, by passing Initiative 872, enacted a enacted a two-stage election with a "winnowing" primary under which all candidates who file would appear on the ballot in the first stage and a run-off between the top two in the second stage.[105] A combination of apparently muddled drafting and indifference to the constitutional limitations of state regulation of partisan activities has left the fate of Initiative 872 in doubt. On May 19, the Washington State Republican party filed suit in the U.S. District Court seeking to have the act declared unconstitutional[106]. The Libertarian and Democratic Parties immediately filed to intervene in support of the Republican Party's claims.[107] A motion for preliminary injunction was lodged on May 26 for the court's June 10th motion calendar.

a. The positions of the Parties.

The Republican, Democratic and Libertarian Parties all contend that their constitutional rights either prevent the state from conducting a "top two" primary or allow their members to join together in any manner prescribed by their party rules to select their nominee. Each party has rules in place and is in the process of nominating candidates authorized to use its name in the 2005 partisan elections. While other candidates may file as independents, it is the parties' contention that each political party may determine which candidate may use the party designation on the ballot, and that any other result would allow a candidate to appropriate the party's name regardless of whether the party desires to associate with that candidate.

While Washington' Secretary of State has asserted that nothing in state election law interferes with a party's decision to have a "nominating convention," and to give financial support to a candidate of its choice, he asserts that the party has no right to control the use of its name on the ballot. The Supreme Court had previously rejected a similar argument:

> The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.[108]

Indeed, as the long line of cases discussed above have demonstrated, a political party's right to control use of its name on the ballot is not only established, it is fundamental:

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[105] Ch. 2,Laws of 2005.

[106] Mr. White serves as counsel for plaintiff in this case.

[107] Washington State Republican Party v Logan, et al, Cause Number CV05-0927, U.S. District Court for the Western District of Washington.

[108] California Democratic Party v. Jones, 530 U. S. 567, 580 (2000).

EXHIBIT P

[The King County Democrat logo/header omitted]

OFFICIAL CALL
KCDCC—2005 Nominating Convention
Tuesday June 28, 2005—7:00 pm
Registration opens at 6:00 pm -- $10.00/person registration donation
Bellevue Community College gymnasium—3300 Landerholm Circle SE--Bellevue

Proposed Agenda

- Call to Order
- Flag Statute
- Welcome and Introductions
- Appointment of Secretary, Parliamentarian, Sergeant-At-Arms, Tally Committee, Timer
- Acceptance of Agenda
- Convention Rules Report
- Acceptance of Rules
- First Credential Report
- Nominations open for King County Executive (all eligible PCOs to vote)
- Five minutes of time for each candidate
- Second Credential Report
- Voting on King County Executive Candidates
- Tally and Results
- Five Minute Break

- Break into Nine King County Council Districts (badges to have Council District Number. Precinct, and Number of Delegate Votes printed along with Name)
    - King County Officers will convene the nine potential sessions
    - Appoint: Secretary, Parliamentarian, Sgt.-At-Arms, Timer, and Tally Committee
    - Rules Report
    - Credential Report
    - Nominations including five minutes of time for each candidate
    - Voting
    - Tally and Results
- Five Minute Break
- Return to General Session to report results of district voting
- Ballots and minutes will be returned to the Chair for safekeeping
- Good of the order
- Adjourn

MAKE YOUR VOICE HEARD!

Use your voice in the election of your Democratic party Candidate.

How will we elect the Democratic Party candidates in 2005?

The U.S. courts have ruled that the right of political parties to choose their nominees is protected by the U.S. Constitution. The Republican, Libertarian and Democratic Parties are challenging the top-two primary system that was passed by initiative in November as unconstitutional. If the courts do not agree that this top-two system is unconstitutional, the political parties have each set up rules to nominate their own candidates for partisan offices. (For complete rules of the 2005 Democratic Party nominating process visit www.kcdems.org or call 206-622-9157.

The County Democratic Party organizations will be holding nominating conventions in May and June to nominate their candidates for partisan offices that will appear on the September primary ballot. The elected and appointed Precinct Committee Officers (PCOs) will meet to elect their nominees for the Districts they live in. The candidate nominated will be placed on the primary ballot with the Democratic symbol beside their name. No other candidate will be able to run as the Democratic Party candidate.

This process will be in place for partisan offices only and will likely change in 2006 depending on action by the legislature or the courts.

How does my voice get heard in the nomination process?

The Democratic Party wants Democrats to get involved. We actually have a more open process than the Republicans. The Democratic Party will be using our Precinct Committee Officers, which are elected by their neighbors every even-numbered year. The Republicans will be using the caucus style system, which is highly Party-driven on the Republican side and limited in the number of people who are allowed to participate. You can get involved in the Democratic party nominating process two ways:

1) Become a Precinct Committee Officer. May 27, 2005, close of the business day, was the deadline for becoming an appointed PCO. All elected and appointed PCOs will have voice and voting rights at the convention.

2) If you did not want to become a PCO you may contact your neighborhood PCO and let them know what Democratic candidate you want to be nominated. This is the most direct form of citizen democracy there is. If your precinct does not have a PCO then contact the one closest to you. The PCOs that are elected and appointed will be seeking your input as well.

As the Democratic Party, we strive year-round to make sure that the rights of citizens to elect their representatives are protected at all levels. We know that this process will not appeal to some; however, we must continue to protect the first amendment

rights of the voters we represent. You can have a say and we want you to have a say!

Please contact your Democratic party officials if you have any questions – see page 5 of this publication.

page 2

Operating rules

for the King County Democratic Nominating Convention

Bellevue Community College Gymnasium—3300 Landerholm Circle SE—Bellevue

(see www.kcdems.org for directions and bus routes)

June 28, 2005—7:00 pm

(Adopted by the KCDCC Executive Board – May 24, 2005)

General

Only Democratic Precinct Officers elected on September 21, 2004, and those Precinct Committee Officers appointed by the King County Democratic Chair by May 27, 2005, may participate in any voting or nominating of candidates. Nominations shall not occur prior to 7:15 p.m.

Any challenges to a Precinct Committee Officer's eligibility to participate must be made in writing to the King County Democratic Chair no later than 6:00 p.m. on June 27, 2005. The Credentials Committee shall review and rule on all challenges.

During the counting of ballots by the tally committee, candidates in those races where ballots are being counted may appoint one observer. The candidate must notify the permanent chair of that particular meeting who their official observer is prior to the counting of the ballots by the tally committee.

In a position where only one candidate has been nominated, that position may be voted on by acclamation.

A PCO's vote shall be weighted, based on the 2000 Presidential results.

All ballots are public record and shall be in the possession of the King County Democratic Chair.

Proxy votes are not allowed.

No other business outside of the nominating of candidates shall take place at the nominating convention.

Any motion to modify or suspend these rules shall be out of order.

Executive

The Chair of the King County Democratic Party shall serve as permanent chair during the King County Executive nominating process. The Chair shall appoint a secretary, parliamentarian, sergeant-at-arms, credentials chair and committee, and tally committee chair and committee. The Chair shall take nominations from the floor. Each nomination requires a second. The nomination and seconding of a candidate shall not count against any time limit.

Candidates shall have up to five minutes to present their candidacy. This can include testimonials from other individuals. The order of presentations shall be in the order nominations were taken.

At conclusion of all presentations, up to ten minutes of questions shall be taken from the floor. All questions must be directed to all candidates. Candidates shall have up to one minute to respond to questions.

All eligible precinct committee officers must sign their ballots. Ballots must be cast for one candidate only and cannot be split.

Abstentions are in order, but shall not count towards the vote totals. Non-signed ballots shall be considered a spoiled ballot and not count toward the vote totals.

A simple majority of votes is needed. If a majority is not obtained by a candidate on the first ballot, the candidate with the least amount of votes shall be dropped, and voting shall take place again. This method will continue to take place until a candidate receives a majority of the vote. In the event that only two candidates remain and tie occurs, the tie shall be broken by lot by the remaining candidates.

Upon the nomination of the Executive, the Chair will direct the Precinct Committee Officers to convene by County Council District in which they were elected or appointed.

County Council

The Chair of the King County Democratic Party shall appoint a permanent Chair for each of the nine county Council nominating meetings. The permanent Chair of the County Council nominating meeting shall appoint a secretary, parliamentarian, and a tally chair and committee.

The permanent Chair shall take nominations from the floor. Each nomination requires a second. The nomination and seconding of a candidate shall not count against any time limit.

Candidates shall have up to five minutes to present their candidacy. This can include testimonials from other individuals. The order of presentations shall be in the order nominations were taken.

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Upon the nomination of the County Council position, the permanent Chair will immediately report to the King County Democratic Chair the results.

Page 3

[The King County Democrat logo/header omitted]

[advertising omitted]

King County Democratic Central Committee Officers

Elected Position	*First name*	*Last Name*	*e-mail* [omitted]
Chair	Susan	Sheary	
First Vice-Chair	Rob	Dolin	
Second Vice-Chair	Marle	Yamamoto	
Third Vice-Chair	Sharon	Mast	
Fourth Vice-Chair	Gurine	Nordby	
State Committeeman	Javier	Valdez	
State Committeewoman	Pat	Taylor	
Treasurer	Chuck	Laney	
Appointments accepted at re-organization 12/4/04			
Recording Secretary	Angela	Henry	
Leg Action Comm	Tina	Shamseldin	
Platform/By-laws	Joel	Ware	
Program Chair	Jean	Amos	
Sergeant-at-Arms	Juan	Martinez	
Parliamentarians/Attys	Paul	Schneiderman	
	Robert	Gaudent	
Independent Audit	Jenson	Hagen	

Candidate Recruitment	Judith Baker Hine
Endorsements	Linnea Peterson

Officers Named to Conduct King County Council District Sessions At 2005 Nominating Convention

The following KCDCC Officers will conduct the nine council nominating sessions at the King County Democrats Nominating Convention on Tuesday June 28, 2005, 7:00 pm.

District 1	Javier Valdez
District 2	Gurine Nordby
District 3	Pat Taylor

District 4	Rob Dolin	[picture omitted]
District 5	Chuck Laney	
District 6	Sharon Mast	
District 7	Susan Sheary	
District 8	Marie Yamamoto	
District 9	Angela Henry	

Javier Valdez will also lead the Credentials Committee, Alec Stephens will serve as Parliamentarian, Sgt-At-Arms, Angela Henry will serve as secretary, and Steven Smith will be in charge of the Tally Committee. Chair of the 36th District LD, Peter House will head the welcome committee.

Page 4

LEGISLATIVE DISTRICT INFORMATION

1st LD
Chair: Jeff Wiley, 425.778.4808
Meets 1st Thursday, 7:00 pm
Northshore Shool Admin
18335 Bothell Way NE, Bothell

5th LD
Chair: Kayne McGladrey,
425.894.5298
Meets 3rd Wednesday, 7:00 pm
Kinig County library Admin
960 Newport Way NW, Issaquah

11th LD
Chair: Edward Prince,
206.246.8747
Meets 3rd Tuesday, 7:00 pm
Carpenters Hall
231 Burnett North, Renton

30th LD
Chair: Larry Jackson,
253.661.2287
Meets 1st Wednesday, 7:00 pm
Federal Way Senior Center
4016 South 352nd St, Federal Way

31st LD
Chair: Tim Pearson
253.863.4543
Meets 4th Wednesday, 7:00 pm
Sumner Library
1116 Fryer Avenue, Sumner

32nd LD
Chair: Lila Smith, 206.818.1195
Meets: 2nd Wednesday, 7:00 pm
American Legion Hall
14521 17th AVE NE, Shoreline

36th LD
Chair: Peter House, 206784.7665
Meets 3rd Thursday, 7:30 pm
See website for locations

37th LD
Chair: Gwen Rench,
206.324.2786
Meets: 2nd Monday, 7:30 pm
Central Area Senior Center
500 30th Ave S., Seattle

41st LD
Chair: Barbara Geller,
206.232.4970
Meets 3rd Wednesday, 7:30 pm
UFCW Hall
12838 SE 40th, Factoria

43rd LD
Chair: Richard Kelley,
206.522.2735
Meets 3rd Tuesday, 7:30 pm
University Baptist Church
NE 47th and 12th Ave NE,
Seattle

45th LD
Chair: Ralph Gorin,
425.556.5789
Meets 1st Wednesday, 7:00 pm
United Methodist Church
16540 NE 80th St, Redmond

46th LD
Chair: Scott White,
206.363.9522
Meets 3rd Thursday, 7:30 pm
Olympic View Elementary School
425 N 95th St, Seattle

33rd LD
Chair: Tara Jo Heinecke, 206.870.8819
Meets 3rd Monday, 7:00 pm
Normandy Park Congregational Church
19247 1st Ave S, Normandy Park

34th LD
Chair: Ivan Weiss, 206.463.4647
Meets 2nd Wednesday, 7:30 pm
The Hall at Fauntleroy
9131 California Ave SW, Seattle

47th LD
Chair: Bryan Kesterson, 253.639.3515
Meets 1st Wednesday, 7:00 pm
Machinists Hall
A St SW at 2nd St SW, Auburn

48th LD
Chair: Benjamin Von Ullrich, 206.979.9073
Meets 3rd Wednesday, 7:00 pm
Stevenson Elementary School Library
14220 NE 8th, Bellevue

KCDCC TREASURY
Cum-t-Date, May 31, 2005 (source: MS Money Manager)

INCOME	
Call for Membership/Incom	$11,197.70
District Donations	6,663.21
Elected Officials	6,850.00
Honors Banquet	13,029.00
Nominating Convention Sponsorship	610.00
Other Events	2,015.82
Refund (Old Postage Due Account and Rent Deposits)	852.59
TOTAL INCOME	$41,218.32
EXPENSE	
Advertising	$30.00
Bank Charges	484.85
Dell computer	996.89
C.N.A.—Liability Insurance	930.00
Membership Fees	100.00
Online / Internet Design and Services	1,400.00
Phone / FAX / Internet	844.03
Rent	2,664.00
Call for Membership	524.23
Consulting / Contract Work	7,450.00
Honors Banquet	8,739.53
Licenses and Fees	10.00
Maps / Research	6,850.00
Miscellaneous	40.00

Newsletter	813.43
Office Supplies	1,269.81
Other Events	4,872.81
Other Supplies	312.09
Postage—New Postage Due Account	100.00
Storage of File (paid through 7/12/2005)	100.00
Translation Service (Brochure in Spanish)	133.28
TOTAL EXPENSE	$38,664.95
BALANCE on 5/31/2005	$2,553.37

EXHIBIT Q

[Libertarian Party web page header omitted]

By Laws

Bylaws: Libertarian party of West King County
As amended on January 11, 2001

Article I: Identify and Purpose

A. The name of this organization is the Libertarian Party of West King County, hereinafter referred to as "the Party" – a regional affiliate of the Libertarian party of Washington State, hereinafter referred to as "the LPWS."

B. The LPWS Statement of Principles affirms the philosophy upon which the Libertarian party is founded: The purpose of the Party is to proclaim and implement the LPWS Statement of Principles by:

a. Nominating, endorsing and running candidates for office in the region, and

b. Entering into political information and educational activities.

c. Promoting local organizations, political and/or social, below the regional level.

The controlling document of the Party is these Party Bylaws. Authority for all matters not specifically addressed by the Party Bylaws will be Robert's Rules of Order.

Article II: Definitions

A. General Business Meetings. All attending Party Members may vote. General Business Meetings are required for interim election of officers, interim amendments to these Bylaws, or other purposes determined by the Chair.

B. Board Meetings. Open meetings for conducting Central Committee business. All attending party Officials may vote. May occur in conjunction with Supper Club events or separately, as called by the Chair.

C. Required Meeting Notices. For General business Meetings and Conventions: minimum 30 days prior notice via state and/or regional newsletter, email and web site announcements. For all other open meetings, including Board Meetings: 14 days prior notice via email and web site. Email is the equivalent of postal mail.

Article III: Membership

Voting membership in the regional Party consists of all current dues-paying LPWS members who reside within the geographic boundaries of this regional party.

Article IV: Central Committee

A. All powers of management and administration reside in the Central Committee. The Central Committee will include up to eight (8) voting members elected by the Party membership – four (4) party officers and four (4) Directors. Directors are also Committee Chairs for the defined responsibility.

B. The Central Committee will convene in open board meetings, at least four times per year. A quorum will consist of at least half the current number of elected Party Officials. General business Meetings are required for (a) interim election of Party Official (s); or (b) proposed amendment(s) to these Bylaws.

Article V: Party Officials

A. There will be four (4) Party officers: Regional Chair, Vice-Chair, Secretary, and Treasurer. If the position of Regional Chair becomes vacant, the line of succession will follow the order listed in this Section.

B. There will be up to four (4) Directors, accountable directly to the membership: Supper Club Director, Membership Director, Communications Director, and Campaigns Director.

C. Officials will be elected by a majority of Party members attending the Party convention. Officials will be elected individually, in the order designated in Section A of this Article. Terms of office will commence immediately upon adjournment, will run until the next annual convention. Only members of the state and regional Parties are eligible to serve as Officials. Officers and Directors may be removed by a 3/5 vote of the Central Committee.

D. The Central Committee may allocate expense budgets for the responsibility of, and the control by, individual Officers and Directors. Officers and Directors may not exceed their budgeted expenses without majority approval by the Central Committee.

E. The duties of each Officer and Director will be as follows:

- The Regional Chair will preside at all Party meetings, and act as CEO of the Party. The Chair may appoint non-officer positions such as Office Manager, Database Manager, Archives Manager, or non-voting Committee

Chairs for such functions as Fundraising, Convention Organizing, etc. If a Directorship is vacant, the Chair may appoint an interim Chair for the committee, however only elected Directors may vote on the Central Committee.

- The Vice Chair will preside at party meetings in the absence of the Regional Chair. The Vice-Chair will also be responsible for keeping abreast of, and fulfilling, current requirements to maintain certification by the State Party – as defined in the LPWS Constitution and Bylaws.
- The Secretary will record and maintain Minutes of party meetings and conventions, and be a signing officer for Party documents.
- The Treasurer will maintain the Party's bank accounts, deposit all revenues, and pay all bills. A formal Treasurer's Report will be presented at least once per calendar quarter.
- The Communications Director (Chair) is responsible for a Member Newsletter, Advertising, Public Relations and a regional Web Site – as and if the Central Committee authorizes and budgets each activity.
- The Campaigns Director (Chair) will recruit candidates and campaign teams for elected office, coordinate campaigns and volunteers where possible, and encourage members to seek appointed office.
- The Membership Director (Chair) will coordinate membership recruiting and retention with both the state and national

parties, and provide local Welcome/ Orientation to new members.

Article V: Supper Club Committee

A. The Supper Club Committee will consist of no more than three members, elected directly by members at any supper club meeting, responsible for monthly dinner/speaker meetings at the regional level. The Committee will elect its own Chair (Director). This Article may be amended only at a Supper Club meeting.

B. The Supper Club Mission is to conduct political outreach on issues affecting both economic and civil liberties, at primarily the state and local levels, both on-site and through print and broadcast media.

Article VI: Representative, State Central Committee

A. The regional Party will elect Regional Representative(s) to the State Central Committee, of sufficient number as permitted by LPWS Bylaws. All candidates who accept nomination to Regional Representative will be considered elected as either a Representative or an Alternate, based on the ranked order of votes received.

B. To assure full representation at meetings of the State Central Committee, the Chair may appoint temporary Regional Representatives or Alternates to vacant positions, for later approval by the membership.

Article VII: Annual Conventions

A. The Party will hold its Convention in January of each year, or by no later than June 30, for electing

Officers, Directors and Regional Representatives; amending bylaws; and nominating or endorsing candidates. A separate convention may be called, for nominations and/or endorsements.

B. Voting delegates will have been members of the Party for at least 60 days before the Convention date.

Article VIII. Amendments

These bylaws may be amended by a simple majority vote at Party conventions, or by a 3/5 majority at any general business meeting. The complete text of all proposed amendments must be provided, and/or made available by request, as part of the required 30-day prior notice.

EXHIBIT R

HELP US COUNT EVERY VOTE!

We need your help. With your contribution, you can help the Washington State Democrats fight for Democratic principles. We will use your contribution to (1) fight Rosse's attempts to undermine the electoral process, (2) reelect Maria Cantwell, (3) maintain the Democratic majority in state government, and (4) continue the overall momentum of Democrats in the state. Thank you!

Contact Information

Title: First Name: MI: Last Name:

Address 1:

Address 2:

City: State: Zip Code:

WA

Home Phone: Email:

( )

Employer: Occupation:

Membership Levels

I wish to donate to one of the following membership levels:

O $1000 Leadership Circle
O $520 Chairman's Club
O $365 Victory Club
O $240 Capitol Club
O $120 Cascade Club

Make a Contribution

If you would like to contribute an amount different from the membership levels, please type in the specified amount here. If you selected a membership level, this will be added to that amount.

O $60 Evergreen Club Amount:
O $36 Washington Club $

Payment Method

Please charge my donation to my Credit Card

O Visa O Mastercard

Credit Card Number: Security Code:

Expiration Date: Card Holder Name:

(mmyy) (e.g. John Q. Public)

Federal Election Law Requirements

☐ I confirm that the following statements are true and accurate:

- I am a United States citizen or a permanent resident alien.
- This contribution is not made from the general treasury funds of a corporation, labor organization or national bank.
- This contribution is not made from the treasury of an entity or person who is a federal contractor.
- The funds I am donating are not being provided to me by another person or entity for the purpose of making this contribution.
- I am at least 18 years old, or the funds I am donating are my own personal funds and I am donating these funds knowingly and voluntarily.

Federal Election law requires political committees to report the name, mailing address, occupation and name of employer for each individual whose

contributions aggregate in excess of $200 in a calendar year. Your contribution will be used in connection with Federal elections and is subject to the limits and prohibitions of the Federal Election Campaign Act.

Your contribution is not tax-deductible as a charitable contribution for Federal Income tax purposes.

Submit Your Contribution [button] Reset [button]

(This will send your information to a secure processing page.)

NOTE:

While you are currently accessing this page over a regular Internet connection, when the page submits your information it will do so via a secure connection.

EXHIBIT S

Join the Libertarian Party Today!

To become a dues-paying member of the Washington state and national Libertarian Parties, fill in and return this form together with $25. You will also receive *LP News* and *Washington Libertarian*.

Name_____

Address_____

City_____State_____Zip_____

Phone (home)_____(work)_____

E-mail address_____

Employer_____Occupation_____

The Libertarian Party is the party of principle. To publicly affirm what we believe – and to ensure that our party never strays from our principles – we ask our members to proudly sign this statement:

I certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals.

_____

(signature required for membership only)

Please enclose a check or money order (no corporate checks please) for $25 payable to "Libertarian Party", or provide the following information to authorize billing to your credit card:

[ ] Visa [ ] MasterCard

Account #_____Exp. Date_____

Signature_____
(signature for credit card payment)

Send this form and payment to:

Libertarian Party
2600 Virginia Avenue NW
Washington, DC 20037

(Government Mandated Notices: The Federal Election Commission requires political committees to report the name, mailing address, and occupation and name of employer to each individual whose contributions aggregate in excess of $200 in a calendar year. The IRS requires us to print "contributions are not tax-deductible" on all fundraising appeals.)

LPWS Home Page

EXHIBIT T

[NARAL web page header omitted]

[extraneous information omitted]

[list appears twice in declaration; listed only once here]

1st District
Sen: Rosemary McAuliffe (D) PRO
Reps:Al O'Brien (D) MIXED +
Mark Ericks (D) PRO

2nd District
Sen: Marilyn Rasmussen (D) MIXED
Reps: Jim McCune (R) UNKNOWN
Tom Campbell (R) ANTI

3rd District
Sen: Lisa Brown (D) PRO
Reps: Alex Wood (D) PRO
Timm Ormsby (D) UNKNOWN

4th District
Sen: Bob McCaslin (R) ANTI
Reps: Larry Crouse (R) ANTI
Lynn Schindler (R) ANTI

5th District
Sen: Cheryl Pflug (R) ANTI
Reps: Jay Rodne (R) UNKNOWN
Glenn Anderson (R) MIXED +

6th District
Sen: Brad Benson (R) ANTI
Reps: John Serben (R) UNKNOWN
John Ahern (R) ANTI

7th District
Sen: Bob Morton (R) ANTI
Reps: Bob Sump (R) ANTI
Joel Kretz (R) UNKNOWN

8th District
Sen: Jerome Delvin (R) ANTI
Reps: Shirley Hankins (R) PRO
Larry Haler (R) UNKNOWN

9th District
Sen: Mark G. Schoesler (R) ANTI
Reps: Don Cox (R) ANTI
David Buri (R) UNKNOWN

10th District
Sen: Mary M. Haugen (D) PRO
Reps: Chris Strow (R) UKNOWN
Barbara Bailey (R) ANTI

11th District
Sen: Margarita Prentice (D) PRO
Reps: Zack Hudgins (D) PRO
Bob Hasegawa (D) PRO

12th District
Sen: Linda Evans Parlette (R) MIXED –
Reps: Cary Condotta (R) UNKNOWN
Mike Armstrong (R) UNKNOWN

13th District
Sen: Joyce Muliken (R) ANTI
Reps: Jan'ea Holmquist (R) UNKNOWN
Bill Hinkle (R) UNKNOWN

14th District
Sen: Alex Deccio (R) ANTI
Reps: Mary Skinner (R) MIXED +
James Clements (R) ANTI

15th District
Sen: Jim Honeyford (R) ANTI
Reps: Bruce Chandler (R) ANTI
Dan Newhouse (R) UNKNOWN

16th District
Sen: Mike Hewitt (R) UNKNOWN
Reps: Maureen Walsh (R) UNKNOWN
Bill Grant (D) PRO

17th District
Sen: Don Benton (R) ANTI
Reps: Jimm Dunn (R) UNKNOWN
Deb Wallace (D) PRO

18th District
Sen: Joseph Zarelli (R) ANTI
Reps: Richard Curtis (R) UNKNOWN
Ed Orcutt (R) UNKNOWN

19th District
Sen: Mark L. Doumit (D) ANTI
Reps: Dean Takko (D) UNKNOWN
Brian Blake (D) PRO

20th District
Sen: Dan Swecker (R) ANTI
Reps: Richard DeBolt (R) ANTI
Gary Alexander (R) MIXED +

21st District
Sen: Paull H. Shin (D) PRO
Reps: Mary Helen Roberts (D) PRO
Brian Sullivan (D) PRO

22nd District
Sen: Karen Fraser (D) PRO
Reps: Brendan Williams (D) PRO
Sam Hunt (D) PRO

23rd District
Sen: Phil Rockefeller (D) PRO
Reps: Sherry Appleton (D) PRO
Beverly Woods (R) ANTI

24th District
Sen: Jim Hargrove (D) ANTI
Reps: Jim Buck (R) ANTI
Lynn Kessler (D) PRO

25th District
Sen: Jim Kastama (D) MIXED +
Reps: Joyce McDonald (R) ANTI
Dawn Morrell (D) PRO

26th District
Sen: Bob Oke (R) ANTI
Reps: Patricia Lantz (D) PRO
Derek Kilmer (D) PRO

27th District
Sen: Debbie Regala (D) PRO
Reps: Dennis Flannigan (D) PRO
Jeanine Darneille (D) PRO

28th District
Sen: Mike Carrell (R) ANTI
Reps: Gigi Talcott (R) ANTI
Tami Green (D) PRO

29th District
Sen: Rosa Franklin (D) PRO
Reps: Steve Conway (D) PRO
Steve Kirby (D) PRO

30th District
Sen: Tracey J. Eide (D) PRO
Reps: Mark Miloscia (D) ANTI
Skip Priest (R) ANTI

31st District
Sen: Pam Roach (R) ANTI
Reps: Dan roach (R) ANTI
Jan Shabro (R) UNKNOWN

32nd District
Sen: Darlene Fairley (D) PRO
Reps: Maralyn Chase (D) PRO
Ruth Kagi (D) PRO

33rd District
Sen: Karen Keiser (D) PRO
Reps: Shay Schual-Berke (D) PRO
Dave Upthegrove (D) PRO

34th District
Sen: Erik Poulsen (D) PRO
Reps: Eileen Cody (D) PRO
Joe McDermott (D) PRO

35th District
Sen: Timothy Sheldon (D) MIXED
Reps: Kathy Haigh (D) PRO
Bill Eickmeyer (D) PRO

36th District
Sen: Jeanne Kohl-Welles (D) PRO
Reps: Helen Sommers (D) PRO
Mary Lou Dickerson (D) PRO

37th District
Sen: Adam Kline (D) PRO
Reps: Sharon Tomiko Santos (D) PRO
Eric Pettigrew (D) PRO

38th District
Sen: Jean Berkey (D) PRO
Reps: John McCoy (D) PRO
Mike Sells (D) PRO

39th District
Sen: Val Stevens (R) ANTI
Reps: Dan Kristiansen (R) ANTI
Kirk Pearson (R) ANTI

40th District
Sen: Harriet A. Spanel (D) PRO
Reps: Dave Quall (D) MIXED +
Jeff Morris (D) MIXED +

41st District
Sen: Brian Weinstein (D) PRO
Reps: Fred Jarrett (R) PRO
Judy Clibborn (D) PRO

42nd District
Sen: Dale Brandland (D) MIXED +
Reps: Doug Ericksen (R) ANTI
Kelli Linville (D) PRO

43rd District
Sen: Pat Thibaudeau (D) PRO
Reps: Edward B. Murray (D) PRO
Frank Chopp (D) PRO

44th District
Sen: Dave Schmidt (R) ANTI
Reps: Hans Dunshee (D) PRO
John Lovick (D) PRO

45th District
Sen: Bill Finkbeiner (R) MIXED
Reps: Toby Nixon (R) ANTI
Larry Springer (D) PRO

46th District
Sen: Ken Jacobsen (D) PRO
Reps: Jim McIntire (D) PRO
Phyllis Gutierrez Kenney (D) PRO

47th District
Sen: Stephen L. Johnson (R) ANTI
Rep: Geoff Simpson (D) PRO
Pat Sullivan (D) PRO

48th District
Sen: Luke Esser (R) ANTI
Reps: Ross Hunter (D) PRO
Rodney Tom (R) MIXED +

49th District
Sen: Craig Pridemore (D) PRO
Reps: Bill Fromhold (D) PRO
Jim Moeller (D) PRO

[NARAL web page header omitted]

[extraneous information omitted]

BILLS TO WATCH

OPPOSED BILLS	BILL NUMBER	STATUS
Establishing parental notification requirement for abortion (-) Companion Bill: HB 1433	SB 5821	Feb 8 First reading, referred to Health & Long-Term care
Prohibiting nonphysicians from performing abortions. (-) Finds that the medical risks to the health of women as a result of obtaining an abortion makes it necessary to clarify that only qualified health care prersonnel may perform abortions or assist in performing abortions.	HB 1774	Feb 4 First reading, referred to Health Care
Prohibiting partial birth abortions (-)	HB 1562	Jan 28 First reading, referred to Health care
Prohibiting public funding of abortion (-) Prevents all use of public funding for abortions except for extremely life-threatening situations. Companion Bill: HB 1776	SB 5852	Feb 10 First reading, referred to Health & Long-Term Care
Prohibiting the sale of fetal body parts. (-) Would prohibit fetal tissues from being sold, used, or donated in any way whatsoever (including medical research or procedures), and are **required** to be buried or cremated.	HB 1563	
Regarding health care provider right of conscience.	SB 5851	Feb 10 First reading, referred to Health & Long-Term Care.

(-)
Would allow doctors or health care personnel to claim a procedure or service to be "against their conscience", and thus be immune to any liabilities or punishments resulting from their refusal to perform it.

Additionally, it would be illegal for hospitals or clinics to discriminate between prospective employees based on the procedures or services they refuse to perform.

Companion Bill: HB 1654

Requiring a report of pregnancy termination be provided to birth mother and biological father and kept by department of health	SB 5836	Feb 9 First reading, referred to Health & Long-Term Care

(-)
Requires all hospitals and lawful abortion clinics to report all details of every abortion, every patient's history, every patient's personal information, etc. to the department of health.

Requires that copies are also sent to the biological mother of the patient, and biological father if possible.

Requiring notice of breast cancer risks related to abortion -SB	SB5820	Feb 8: First reading, referred to Health & Long-Term Care

(-)
Would make it unlawful to provide an abortion without informing the patient of any and all possible research which may arise linking abortion to breast cancer.

Effectively makes parental consent required for abortions for minors.

Makes it illegal for a person to perform an abortion unless they have enough insurance to cover any potential lawsuit due to "reproductive cancers".

SUPPORTED BILLS	BILL NUMBER	STATUS
Healthy Youth Act Senate Bill	SB 5306	Jan. 24: Public hearing in committee

(-)
Declares that the state has a duty to ensure that young people are equipped with the comprehensive, medically accurate, age-appropriate information that they need to protect themselves from unintended pregnancy and sexually transmitted diseases, including HIV infection. The best approach to protecting youth in this environment is to

support the resources that they trust and to ensure that young people ;have as much accurate, objective information about sexual health as possible.

The Companion Bill is HB 1282

Limiting the court's discretion concerning denial of dissolution decrees (-)	HB 1171	Jan 18 First reading, referred to Juvenile Justice & Family Law.

Provides that, in considering a petition for dissolution, a court may not use the petitioner's pregnancy as a bsasis for denying the decree for dissolution, nor may the court continue the matter on that basis.

EXHIBIT U

[pictures have been omitted]

HOUSE OF REPRESENTATIVES

John Ahern	Spokane	District 6
Gary Alexander	Olympia	District 20
Glenn Anderson	Fall City	District 5
Mike Armstrong	Wenatchee	District 12
Barbara Bailey	Oak harbor	District 10
Jim Buck	Joyce	District 24
David Buri	Colfax	District 9
Bruce Chandler	Granger	District 15
Jim Clements	Selah	District 14
Cary Condotta	Wentachee	District 12
Don Cox	Colfax	District 9
Larry Crouse	Spokane	District 4
Richard Curtis	La Center	District 18
Richard DeBolt	Chehalis	District 20
Jim Dunn	Vancouver	District 17
Doug Ericksen	Ferndale	District 42
Larry Haler	Richland	District 8
Shirley Hankins	Richland	District 8
Bill Hinkle	Cle Elum	District 13
Janéa Holmquist	Moses Lake	District 13

Fred Jarrett	Mercer Island	District 41
Joel Kretz	Waucoada	District 7
Dan Kristiansen	Snohomish	District 39
Jim McCune	Graham	District 2
Joyce McDonald	Puyallup	District 25
Dan Newhouse	Sunnyside	District 15
Toby Nixon	Kirkland	District 45
Ed Orcutt	Kalama	District 18
Kirk Pearson	Monroe	District 39
Skip Priest	Federal Way	District 30
Dan Roach	Bonney Lake	District 31
Jay Rodne	Snoqualmie	District 5
Lynn Schindler	Spokane	District 4
John Serben	Spokane	District 6
Jan Shabro	Lake Tapps	District 31
Mary Skinner	Yakima	District 14
Chris Strow	Clinton	District 10
Bob Sump	Republic	District 7
Gigi Talcott	Tacoma	District 28
Rodney Tom	Bellevue	District 48
Maureen Walsh	Walla Walla	District 16
Beverly Woods	Kingston	District 23

EXHIBIT V

[pictures have been omitted]

SENATORS

Jean Berkey	Everett	District 38
Lisa Brown	Spokane	District 3
Mark Doumit	Cathlamet	District 19
Tracey Eide	Federal Way	District 30
Darlene Fairley	Lake Forest Park	District 32
Rosa Franklin	Tacoma	District 29
Karen Fraser	Thurston County	District 22
Jim Hargrove	Hoquiam	District 24
Mary Margaret Haugen	Camano Island	District 10
Ken Jacobsen	Seattle	District 46
Jim Kastama	Puyallup	District 25
Karen Keiser	Kent	District 33
Adam Kline	Seattle	District 37
Jeanne Kohl-Welles	Seattle	District 36
Rosemary McAuliffe	Seattle	District 1
Erik Poulsen	Seattle	District 34
Kargarita Prentice	Renton	District 11
Craig Pridemore	Vancouver	District 49
Marilyn Rasmussen	Eatonville	District 2
Debbie Regala	Tacoma	District 27
Phil Rockefeller	Kitsap County	District 23
Tim Sheldon	Potlatch	District 35

Paull Shin	Edmonds	District 21
Harriet Spanel	Bellingham	District 40
Pat Thibaudeau	Seattle	District 43
Brian Weinstein	Eastside Suburbs	District 41

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners, v. DEAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners, WASHINGTON STATE GRANGE, et al., Defendant Interveners.	Case No: CV05-0927-TSZ WASHINGTON STATE GRANGE'S CONSOLIDATED RESPONSE TO THE SUMMARY JUDGMENT / INJUNCTION MOTIONS OF (1) THE WASHINGTON STATE REPUBLICAN PARTY; (2) THE WASHINGTON DEMOCRATIC CENTRAL COMMITTEE; & (3) THE LIBERTARIAN PARTY OF WASHINGTON STATE *["Grange's Consolidated Response"]* ***Noted for Oral Argument: 9:00 a.m., Wednesday, July 13, 2005***

* * *

[27]

membership qualifications."[39] The Libertarian Party claims the Initiative "prevents the parties from settling their differences internally."[40] And the

Democratic Party claims the Initiative "forces the political parties to adulterate their candidate selection process with nonmembers of their party."[41]

The text of Initiative 872, however, does no such thing. For example:

- *Membership.* The Democratic and Republican Parties allow you to self-designate yourself as (and become) a member by signing a check – e.g., signing a $36 check buys you a "Washington Club" membership in the Democratic Party.[42] And the Libertarian Party allows you to self-designate yourself as (and become) a member by signing a sentence that says you're non-violent.[43] Initiative 872 does nothing to change the parties' internal rules governing ***their*** membership criteria.

- *Platform.* The Democratic Party and Republican Party have opposite positions on abortion.[44] Initiative 872 does nothing to change the parties' internal rules governing ***their*** positions on issues.

- *Adherence to Party Platform.* The political parties do not currently require their members to adhere to the parties' platform. For example, the Democratic Party and Republican Party both include in their caucuses of the Washington State Legislature members who espouse positions directly at odds with the party's position on the core value issue of abortion.[45] Initiative 872 does not prohibit the parties from changing their

internal rules to exclude from membership those persons who do not espouse or adhere to ***their*** core values.

- *Nominee.* The parties are free to select whatever person they want to be ***their*** "nominees" for public office, and limit the persons making the parties' selection . . .

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[39] Republican Party S.J. Motion at 8:18-19; see also Libertarian Party S.J. Motion at 8:5-6.

[40] Libertarian Party S.J. Motion at 8:18-19.

41 Democratic Party S.J. Motion at 17:9-11.

[42] Grange Documents Dec., Ex. R (WSDCC membership form).

[43] Grange Documents Dec., Ex. S (Libertarian membership form; the sentence says: "I certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals").

[44] Grange Documents Dec., Ex. C at "Human Rights & Civil Rights" section, unnumbered Platform p.8 (Washington State **Democratic** Party 2004 Platform); Grange Documents Dec., Ex. A at p.5 (2004 Washington State **Republican** Party Platform).

[45] For example, NARAL Pro-Choice Washington identifies **Republican** State Representative Shirley Hankins and Fred Jarrett as being "PRO" [for "Pro-choice"]. Grange Documents Dec. Ex. T at pp.2 & 5 (NARAL listings). Yet the Republican Party includes representatives Hankins and Jarrett as members of the Republican House Caucus. Grange Documents Dec. Ex. U at p.2 (House Republican Caucus Members directory). Similarly, NARAL Pro-Choice Washington identifies **Democratic** State Senators Mark L. Doumit and Jim Hargrove as "ANTI" [for "Anti-choice"]. Grange Documents Dec. Ex. T at p.3 (NARAL listings). Yet the Democratic Party includes senators Doumit and Hargrove as members of the

Democratic Senate Caucus. Grange Documents Dec. Ex. V at p.1 (Senate Democratic Caucus Members directory).

* * *

[32]

* * *

C. *Stipulated Issue 3*: "If the primary system under Initiative 872 nominates political party candidates for public office, does Initiative 872 violate the first amendment by compelling a political party to associate with unaffiliated voters and members of other political parties in the selection of its nominees?"

No.

The primary system established by Initiative 872 does not compel the ***political parties*** to do anything – never mind force them to include in their internal organization any "unaffiliated" voter or "member" of some other political party.

Instead, the top-two system established by Initiative 872 allows ***the candidate*** to disclose the political party which that candidate prefers. Unlike the "blanket" and "Montana" systems that required a political party to accept the candidate who prevailed in the September primary as being that party's nominee on the November ballot, the Initiative's top-two system does not require or force any ***political party*** to do anything.

For example, if the Republican Party wants to say it has nothing to do with and does not support former State Republican Chair and Congressional

leader Jennifer Dunn's son (Reagan Dunn) for King County Counsel, it can do so. But it cannot co-opt the power of the government to secure a prior restraint against Reagan Dunn's stating to voters that the party he "prefers" is the Republicans.

* * *

[36]

As the Republican Party's lead counsel in this case has candidly explained elsewhere, Initiative 872 "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage."[49] The Republican Party's June submissions do not establish any constitutional "right" to always be one of the top two candidates chosen by the voters in that new top two system.

G. *Plaintiffs' Supplemental Issue 6:* "Should Initiative 872 be invalidated in its entirety?"

No.

The Initiative's allowing a candidate to disclose the political party he "prefers" is at the heart of the political parties' complaints. And the Libertarian Party succinctly identifies the allegedly offending sections of Initiative 872:

> **Section 7(3)** of I-872 expressly provides for candidates to indicate a political party "preference" when filing a declaration of candidacy and will be shown on ballots "for the information of voters." **Section 11** expressly provides

> that the candidate's party "preference" will be included in the state voter's pamphlet.

Libertarian Party S.J. Motion at 7:17-20 (emphasis added).

As explained earlier, however, this "preference" disclosure part of Initiative 872 is not unconstitutional.

Moreover, even if that "preference" part were unconstitutional, that part could be invalidated without having to nullify the entire top-two system enacted into law by the voters – for as the plaintiff Republican Party's own motion acknowledges, "in ordinary circumstances only the specific part of an enactment that is unconstitutional will be invalidated."[50]

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[49] Documents Dec., Ex. L (*Political Parties: Their Legal Role in Elections* (June 21, 2005 Election Law CLE materials by Richard Derham and John White) at p. 24, first paragraph.

[50] Republican Party S.J. Motion at 26:20-21.

[37]

The severability of a State statute presents a question of State law.[51]

And Washington State law holds that if part of a statute is unconstitutional, "only the part of [the] enactment that is constitutionally infirm will be invalidated, leaving the rest intact." *Guard v. Jackson*, 333 P.2d 544, 548, 83 Wash.App. 325 (1996) (severing part of statute that violated due process rights and upholding the remainder of statute), aff'd,

132 Wash.2d 660, 940 P.2d 642 (1997); cf. the parallel federal law, e.g., *U.S. v. Booker*, 125 S.Ct. 738, 764, 160 L.Ed.2d 621 (2005) (courts "must refrain from invalidating more of the statute than is necessary. Indeed, [courts] must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute") (internal citations & quotation marks omitted).

Washington law further holds that "a severability clause is not necessary in order to meet the severability test." *In re Parentage of CAMA*, 109 P.3d 405, 414, 154 Wash.2d 52 (2005).

Washington law accordingly does not strike down a Washington statute in its entirety "unless ... it cannot reasonably be believed that the legislative body would have passed one [part] without the other, or unless the elimination of the invalid part would render the remaining part useless to accomplish the legislative purpose." *McGowan v. State*, 60 P.3d 67, 75, 148 Wash.2d 278 (2002) (severing unconstitutional part of Section 2(1)(d) in Initiative 732, but upholding the remaining parts of that Initiative).

Washington law further holds that the legislative declaration of intent in the statute at issue can save a statute with unconstitutional provisions from being struck down in its entirety – for if the *valid* parts of the statute can still fulfill a declared intent, then the statute is severable

---

[51] *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (finding portion of primary statute unconstitutional but remanding to district court to perform severance analysis according to Arizona State law standards).

[38]

and only the *in*valid parts will be stricken. *McGowan*, 60 P.3d at 76 (relying on Initiative's intent section to determine that unconstitutional portion of Initiative 732 could be severed).

Here, Sections 1 & 2 of Initiative 872 express the Initiative's intent. Those Sections declare an intent of the Initiative to allow each *voter* to chose from among all declared candidates in the primary to winnow the list of candidates on the November ballot down to two, while maintaining each *voter's* right to keep his or her personal politics absolutely secret.

Those purposes can be served even if this Court strikes down the allegedly unconstitutional part of the Initiative that allows *candidates* to disclose the political party (if any) they prefer. Thus, if this Court agrees with the plaintiffs' arguments that it is unconstitutional for Initiative 872 to allow a candidate to state that he or she "prefers" a particular political party without that party granting the candidate permission to make that statement, then Washington law requires this Court to invalidate only that "preference" part of the Initiative instead of striking down the People's enactment in its entirety.[52]

H. *The Republican Party's Preliminary Injunction Motion:* Do the Republican Party's submissions prove that this federal court should write a new law for the State of Washington's upcoming 2005 primary?

Departing from its core value of opposing judicial activism by the federal courts, the Republican Party demands that this federal Court invalidate the top-two election system established by Initiative 872, and then effectively re-enact the prior "Montana" system after severing out and invalidating the parts of that system that the Republican Party claims are equally unconstitutional.

Even if the political parties' June motions had established that Initiative 872 is facially unconstitutional, the plaintiffs still would not be entitled to the injunction they demand unless:

---

[52] Although the plaintiff Republican Party suggests that Washington voters are too unintelligent to want to vote for a constitutional Initiative (Republican Party S.J. Motion at 27:3-4 ("It cannot be believed that voters would have passed the initiative stripped of its ... unconstitutional provisions")), it provides no support for that ad hominem attack on the citizens of our State, and the Grange accordingly does not waste time or space with an argument in reply.

* * *

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners v. DEAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners WASHINGTON STATE GRANGE, et al., Defendant Interveners	Case No: CV05-0927-TSZ DECLARATION OF RICHARD WINGER

I, RICHARD WINGER, declare on penalty of perjury under 28 U.S.C. 1746 as follows:

I am over the age of 18, not a party to this action and competent to make the following statements. My curriculum vitae is attached to this document as Exhibit A.

I have had an opportunity to examine Washington state's primary election returns for all congressional elections, and all state office elections, for the years 1992-2002, taking the data supplied on the website for the Washington Secretary of State. I calculated the percentage of the total vote received by each candidate who placed second.

The results for each election return are: 1992, the average second-place finisher polled 31.80%. 1994, 33.37%. 1996, 33.28%. 1998, 29.94%. 2000, 31.58%. 2002, 34.61%. The average of all these averages is 32.43%. The average second-place finisher in Washington state blanket primaries 1992-2002 polled 32.43%.

Excluding the obvious cases when only one major (Democratic or Republican) party candidate was running, I found that no one but a Republican or a Democrat ever placed first or second, with one exception. That single exception was in 2000 in the 38th state legislative district, for State House or Representatives, seat # 2. In a race with two Democratic candidates, one Reform candidate, and one Libertarian candidate, one Democrat (who had polled 63.75% in the primary) and the Reform candidate finished first and second, respectively.

DATED Tuesday, July 5, 2005, at San Francisco, California.

Richard Winger

RICHARD WINGER

Richard Winger
3201 Baker Street
San Francisco, California 94123

Curriculae Vitae, updated April 25, 2005

EDUCATION

BA, Political Science, University of California, Berkeley, 1966 Graduate study, Political Science, UCLA, 1966-67

EMPLOYMENT

Ballot Access News, Editor 1985-Present

Editor of newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. Researcher of ballot access laws of all 50 states from years 1888-present; well versed in how ballot access laws of each state work historically and how they compare to each other. Responsible for reading all statutes, regulations, legal opinions, and state attorney general opinions on rights of political parties and the publications of minor parties.

On the editorial Board of *Election Law Journal,* published by Mary Ann Liebert, Inc., Larchmont, N.Y., since 2001.

PUBLICATIONS

Wrote a chapter or two in each of these books:

Democracy's Moment

Edited by Ronald Hayduk and Kevin Mattson (2002: Rowman & Littlefield, Lanham, Md.)

The Encyclopedia of Third Parties in America

edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.)

Multiparty Politics in America

Edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.)

The New Populist Reader

Edited by Karl Trautman (1997: Praeger, Westport, Ct.)

Additional articles published in these periodicals:

Wall Street Journal

American Review of Politics

The Long Term View

University of Mass. Law Review

California Journal

Election Law Journal

Cleveland State Law Review

Chronicles Magazine

Price Costco Connection

Fordham Urban Law Journal

NATIONAL INTERVIEWS on Minor Parties, Independents, Ballots and Ballot Access

NBC	National Public Radio
ABC	Pacifica Radio
CNN	MSNBC

CASES: TESTIMONY or AFFIDAVITS (political party or candidate prevailing)

Alaska: Libertarian Party v Coghill, state superior court, 3rd dist., 3AN-92-08181, 1992 Court issued injunction enjoining enforcement of petition deadline for minor parties

Arizona (2 cases): Campbell v Hull, 73 F Supp 2d 1081 (1999); Az. Libt. Party v Hull, superior court, Maricopa Co. 96-13996, 1996. Court ordered Secretary of State to place Libertarian Party presidential candidate on ballot.

Arkansas (2 cases): Citizens to Establish a Reform Party v Priest, 970 F Supp 690 (E.D. Ark. 1996); Green Party of Ark. v. Priest, 159 F.Supp.2d (E.D. Ark. 2001).

California: California Democratic Party v Jones, 530 US 567 (2000).

Colorado: Ptak v Meyer, 94-N-2250, U.S. Dist. Ct., 1994. Court ordered Secretary of State to place Libertarian legislative candidate on ballot.

Florida (2 cases): Libt. Party of Fla. v Mortham, 4:96cv258-RH, U.S. Dist. Ct., N.D., 1996. Court ordered Secretary of State to place Libertarian vice-presidential candidate on ballot. Reform Party v Black, 885 So.2d 303 (Fla. 2004).

Georgia: Bergland v Harris, 767 F 2d 1551 (11th cir., 1985). U.S. Court of Appeals remanded case back to U.S. District Court.

Before U.S. District Court acted, legislature substantially eased law, so case became moot.

Hawaii: Libt. Party of Hi. v Waihee, cv 86-439, U.S. Dist. Ct., 1986. Court ordered Lieutenant Governor to extend petition deadline for new parties.

Illinois: Nader v Ill. State Bd. of Elections, 00-cv-4401, U.S. Dist. Ct., N.D., 2000. Court ordered State Board of Elections to place candidate on ballot.

Iowa: Oviatt v Baxter, 4:92-10513, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put Grassroots Party candidate for Congress on ballot.

Kansas: Merritt v Graves, 87-4264-R, U.S. Dist. Ct., 1988. State did not defend three election laws and signed consent decree on independent petition deadline, requirement that independent petitions not be circulated outside of circulator's home precinct, and requirement that voters could only register in qualified parties. This case should not be confused with another by the same name decided in December, 1988.

Kentucky: Libt. Pty. of Ky. v Ehrler, 776 F Supp 1200 (E.D. 1991)

Maryland (2 cases): Dixon v Md. State Adm. Bd. of Elec. Laws, 878 F 2d 776 (1989, 4th cir.); Green Party v Bd. of Elections, 832 A 2d 214 (Md. 2003).

Nevada (2 cases): Libt Pty. of Nev. v Swackhamer 638 F Supp 565 (1986); Fulani v

Lau, cv-N-92-535, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put various minor parties on ballot.

New Jersey (2 cases): Council of alternative Political Parties v Hooks, 999 F Supp 607 (1998); Council of alternative Political Parties v State Div. of Elections, 781 A 2d 1041 (N.J.Super. A.D. 2001)

New York (3 cases): Molinari v Powers, 82 F Supp 57 (E.D.N.Y. 2000); Schulz w Williams, 44 F 3d 48 (2nd cir., 1994); Green Party of N.Y. v N.Y. State Bd. of Elections, 389 F.3d 411 (2nd cir., 2004).

North Carolina: Obie v N.C. Bd. of Elections, 762 F Supp 119 (E.D. 1991); DeLaney v Bartlett, decided July 26, 2004 (middle district, 1:02-cv-741).

Oklahoma: Atherton v Ward, 22 2F Supp 2d 1265 (W.D. Ok. 1998); Beaver v Clingman, 363 F.3d 1048 (10th cir., 2004).

Pennsylvania: Patriot Party of Pa. v Mitchell, 826 F Supp 926 (E.D. 1993).

South Dakota: Nader v Hazeltine, 110 F Supp 2d 1201 (2000).

Texas: Pilcher v Rains, 853 F 2d 334 (5th cir., 1988).

Virginia: Libt. Pty of Va. v Quinn, 3:01-cv-468, U.S. Dist. Ct., E.D. (2001). Court ordered State Board of Elections to print "Libertarian" party label on ballot next to name of Libertarian candidates.

West Virginia (3 cases): State ex rel Browne v Hechler, 476 SE 2d 559 (Supreme Court 1996); Nader v Hechler, 112 F.Supp.2d 575 (S.D.W.V., 2000); McClure v Manchin, 301 F Supp 2d 564 (2003).

CASES: TESTIMONY or AFFIDAVITS (political party or candidate not prevailing)

Arizona: (2 cases) Indp. Amer. Party v Hull, civ 96-1240, U.S. Dist. Ct., 1996; Browne v Bayless, 46 P 3d 416 (2002).

Arkansas (2 cases): Langguth v McKuen, LR-C-92-466, U.S. Dist. Ct., E.d., 1992; Christian Populist Party v Sec. of State, 650 F Supp 1205 (E.D. 1987).

California: Socialist Workers Party v Eu, 591 F 2d 1252 (9th cir., 1978)

Florida (2 cases): Fulani v Smith, 92-4629, Leon Co. Circuit Court, 1992; Libertarian Party of Fla. v State of Fla., 710 F 2d 790 (11th cir., 1983).

Georgia (2 cases): Libertarian Party of Ga. v Cleland, 1:94-cv-1503-CC, U.S. Dist. Ct., N.D. (1994); Esco v Secretary of State, E-53493, Fulton Co. Superior Court, 1998.

Idaho: Nader v Cenarrusa, cv 00-503-, U.S. Dist. Ct. 2000.

Illinois: Libt Party v Rednour, 108 F 3d 768 (7th cir., 1997)

Kansas: Hagelin for President Committee v Graves, 804 F Supp 1377 (1992)

Maine (2 cases): Maine Green Party v Diamond, 95-318, U.S. Dist. Ct., 1995; Maine Green Party v Secretary of State, 96-cv-261, U.S. Dist. Ct., 1996

Maryland (2 cases): Ahmad v Raynor, R-88-869, U.S. Dist Ct., 1988; Creager v State Adm. Bd. of Election Laws, AW-96-2612, U.S. Dist. Ct., 1996.

Missouri: Manifold v Blunt, 863 F 2d 1368 (8th cir. 1988)

New Hampshire: Werme v Gov. of N.H., 84 F 3d 479 (1st cir., 1996).

North Carolina: Nader v Bartlett, 00-2040, 4th cir., 2000.

Ohio: Schrader v Blackwell, 241 F 2d 783 (6th cir., 2001)

Oklahoma (2 cases): Rainbow Coalition v Okla. State Elec. Bd., 844 F 2d 740 (1988); Nader v Ward, 00-1340, U.S. Dist. Ct., 1996

Oregon: Libt Party v Roberts, 737 P 2d 137 (Ore. Ct. of Appeals, 1987).

Texas (2 cases): Texas Indp. Party v Kirk, 84 F 3d 178 (5th cir., 1996); Nat. Comm. of U.S. Taxpayers Party v Garza, 924 F Supp 71 (W.D. 1996).

Virginia: Wood v Meadows, 207 F 3d 708 (4th cir., 2000)

West Virginia: Fishbeck v Hechler, 85 F 3d 162 (4th cir., 1996)

Wyoming: Spiegel v State of Wyoming, 96-cv-1028, U.S. Dist. Ct., 1996.

QUALIFIED EXPERT WITNESS

Fishbeck v Hechler, 85 F 3d 162 (4th cir. 1996, West Virginia case)

Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998, N.J.)

Citizens to Establish Reform Party v Priest, 970 F Supp 690 (E.D. Ark, 1996)

Atherton v Ward, 22 F Supp 2d 1265 (W.D.Ok. 1998)

Calif. Democratic Party v Jones, 530 US 567 (2000)

Swanson v Bennett, not decided yet, U.S. Dist. Ct., m.d.Ala. (02-T-644-N)

Beaver v Clingman, 363 F 3d 1048 (10th cir., 2004, Okla. Case)

Green Party v N.Y. State Bd. Elections, 267 F Supp 2d 342 (E.D.N.Y. 2003)

Lawrence v Blackwell, pending in 6th cir., U.S. Dist. s.d. Ohio (1:04-cv-398);

In all cases in which I was presented as an expert, the opposition accepted that designation, except in the Green Party of New York case. The U.S. District Court ruled that I qualify as an expert. See headnote #1 at page 342, and footnote nine on page 350.

SPEAKING ENGAGEMENTS: Colleges and Scholarly Meetings

Panel of New York City Bar Association, 1994. Ballot access.

Amer. Political Science Assn., nat. conventions of August 1995 and August 1996. Papers.

Capital University School, law school class, Columbus, Ohio, 1996. Guest lecturer.

Cal. State U., course in political science, Hayward, 1993 and 1996. Guest lecturer.

San Francisco City College, course in political science, 1996 and 1997. Guest lecturer.

Providence College, R.I., Oct. 1997, seminar on ballot access.

Harvard U., JFK School of Gov't, Oct. 18, 1995, guest lecturer, ballot access.

Voting Integrity Project national conference, Apr. 1, 2000, speaker on ballot access.

Center for Voting & Democracy nat. conference, Nov. 30, 2003,speaker on ballot access.

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Interveners, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Plaintiff Interveners, v. EAN LOGAN, et al., Defendants, STATE OF WASHINGTON, et al., Defendant Interveners, WASHINGTON STATE GRANGE, et al., Defendant Interveners.	Case No: CV05-0927-TSZ LIBERTARIAN PARTY REPLY TO THE STATE AND GRANGE RESPONSES TO THE LIBERTARIAN PARTY MOTION FOR SUMMARY JUDGMENT AND LIBERTARIAN PARTY RESPONSE TO THE STATE MOTION FOR SUMMARY JUDGMENT NOTED FOR HEARING ON: JULY 13, 2005, AT 9:00 AM.

PRELIMINARY MATTERS

First, the Libertarian Party ("the LP") does not "agree" with the State that this case is "ripe for adjudication" (CD 65, at 5). The LP expressed a preference at the June 7th status conference to conduct discovery before seeking disposition on the

merits, particularly if the defendants were going to allege the LP was not harmed by I-872. The LP filed its motion for summary judgment because the defendant County Auditors—for whom the Secretary of State has now substituted (CD 67)—demanded an accelerated disposition of the case and consequently this court's scheduling order called for *cross-motions* for summary judgment to be filed on June 17th. To the extent this case has been accelerated to accommodate the interests of other litigants, the LP's interests in a fully developed record are prejudiced. The LP objects to the state's characterization of this case as "ripe for adjudication."

Second, the State didn't move for summary judgment on the 17th as required by the court's scheduling order. Its current request for summary judgment filed on July 1, 2005 (CD 65, at 4) is therefore untimely under this court's scheduling order. If the court is going to consider the State's motion for summary judgment outside of the requirements of the scheduling order the LP should be allowed to submit responsive materials, including affidavits, declarations and other evidence, up to the date of hearing, according to the terms of Rule 56.

FACTUAL CORRECTIONS TO THE RESPONSE BRIEFS

The State incorrectly argues that the "blanket primary" invalidated by *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (C.A.9 2003)(*"Reed"*) "was designed to, and did, advance to the general election ballot a candidate representing

each of the major political parties." (CD 65 at 6)[1] To the extent this is true at all it is the result of political party perseverance, and in spite of state action. Under the blanket primary system only minor political parties could directly nominate their candidates through the mechanism of nominating conventions. The blanket primary allowed no similar mechanism for major political parties to qualify or screen candidates as party standard bearers. Any person could designate any major political party on his or her declaration of candidacy and there was no statutory guarantee that a plurality winner was a member of that party or adhered to its message.

Second, contrary to the State's assertions, I-872 did not "eliminat[e] party affiliation as a factor in determining whether candidates advance to the general election ballot." (CD 65, at 8) A candidate's political party "preference" is published to voters in three instances that are most critical to the election process. I-872 §§ 7(3), 11. By I-872's own terms party affiliation is "a factor" in the election system it creates.

Third, the Grange mistakenly alleges the LP is "forsaking its core values of individual privacy and freedom from government restraint," by forcing voters to disclose their "political leanings" when they vote in September, and by depriving candidates of their right to state their political "preferences." (CD 70, at 1). This is nonsense. The LP has never

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[1] The Grange makes a similar mistake, claiming the "*result* was the selection of the ***political parties'*** candidates for the November ballot." (CD 70, at 4)(emphasis in original).

advocated in favor of the "Montana" primary.[2] The LP argues here for the right to nominate by convention and to have the results recognized by the State. Candidate statements of "preference," according to the LP, become problematic only when they mislead the public as to whom the candidates represent.

Finally, the Grange claims a "long, proud history of opposing powerbrokers and special interests." CD 70, at 5). The Grange fails to recognize it has been at it for so long that it has become what it opposes.[3]

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[2] Some Libertarians argue the Montana system works against the Libertarian Party. But for a sympathetic ruling in state court the LP would not have had candidates on the November 2004 ballot for Governor or U.S. Senator.

[3] "The Grange argues that Grange members support water and public utilities for farms and that its members' rights to advance their rural agenda in both parties will suffer if each Granger is forced to choose a party ballot. The Grange says that it spearheaded the initiative in 1933 that led Washington to adopt the blanket primary, which has successfully prevented "a politically corrupt nominating process controlled by political bosses or special interests." "Special interests" are evidently in the eye of the beholder. Some urban voters might think that special protection for rural water and electricity concerns serve a "special interest" of farmers, and that the Grange is a special interest group." Reed, 343 F.3d at 1206.

DISCUSSION

I. WHETHER I-872 "NOMINATES POLITICAL PARTY CANDIDATES"

Stipulated Issue #1 Is Not The Threshold Issue

The fundamental assumption of the "top two" election model is that the purpose of elections is to elect public officials, not to serve as a general forum for political expression. "If you want to win, you have to appeal to and receive the voter's support." Grange Brief (CD 70, at 23). This limited view is, at best, oversimplified and ignorant of contemporary understandings of the election process.

Modern social science theorists applying a "rational choice" model teach that political party adherents, voters and candidates all view politics as a competitive market. Under a given set of electoral rules voters and candidates make rationally self-interested decisions about politics in much the same way consumers of goods and services make decisions about economic matters.[4] The consequence is candidates often run (or not) and voters often vote (or not) not to win or back a winner but to make a political statement.[5]

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[4] See e.g., John H. Aldrich, *Why Parties? The Origin And Transformation Of Political Parties In America* 12-13 (1995).

[5] See, e.g., Dennis F. Thompson, *Just Elections: Creating A Fair Electoral Process In The United States*, 24 (2002) ("Elections are not only instruments for choosing governments; they are also media for sending messages about the democratic process.").

Five decades ago Professor McLuhan taught us "the medium is the message." The Grange recognized that election systems are not merely administrative procedures but have substantive policy content when it argued in the Voter's Pamphlet: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." (CD 66, Exh. A at 4). Compare, *California Democratic Party v. Jones*, 530 U.S. 567, 580 (2000) (whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions).

But some political actors, such as the LP and its adherents, are more interested in effectively promulgating an ideological message than in winning. And the Supreme Court has recognized the right of individuals and political parties to do exactly that. *Norman v. Reed*, 502 U.S. 279 288-289 (U.S., 1992).

This is why Stipulated Issue #1 is really not the threshold issue. The threshold issue should be: "Does I-872 impermissibly infringe upon constitutional rights of political parties, candidates and voters in a partisan election system?"

Reed puts it succinctly. "As for the State of Washington's argument that the party nominees chosen at blanket primaries are the 'nominees' not of the parties but of the electorate, that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees." 343 F.3d at 1204 (footnote omitted) Regardless how much the State and Grange want to re-characterize the issue, I-872 does the same thing.

The Grange and the State both argue because I-872 is not intended to "nominate political party candidates" it is constitutionally valid. Both seek to cut political parties out of an unequivocally partisan election system. See, e.g., I-872, § 4. The Grange virtually ignores party nomination rights; focusing instead on what it believes are the rights of candidates and voters. (CD 13, 16, 24, 29, 30, 31) The State makes the doubtful[6] claim that the right of political parties to nominate is a "private" right that the state need not recognize. (CD 65, at 12, 27, 32) Similar arguments that the political parties are free to endorse candidates were explicitly rejected in *Jones*, 530 U.S. at 580 ("The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee.")

The "top two" model impoverishes the First Amendment rights of voters by depriving them of substantive choices at the general election—giving them choices tantamount to "Ford" or "Chevy," meanwhile depriving them of the opportunity to choose "Dodge," "Lexus," "Hummer" or "Mini Cooper" in the election that matters.[7] It deprives candidates

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[6] See, *Brower v. Washington*, 969 P.2d 42 (1998); cert. den., 526 U.S. 1088 (1999)(elections are public functions held for a governmental purpose)

[7] "Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent." Andrew C. McLaughlin, *Political Parties and Popular Government*, in *The Courts, the Constitution and Parties*, 151 (1912). "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the *Manchester Advertiser*, Mar. 3, 1911.

of First Amendment rights of association by forcing them to run as "independents" whether they want to or not. It emasculates the First Amendment association and Fourteenth Amendment liberty rights of political parties by statutorily separating them from the very process for which they are formed to participate.

By failing (or refusing) to include a political party nomination mechanism within its partisan scheme I-872 deprives all political actors of their rights. I-872 favors centrist or "moderate" candidates over ideological or programmatic candidates, which function was expressly rejected in *Jones*, 530 U.S. at 580. This is why I-872 must fail, to protect the losers.

I-872 Is Not A Nonpartisan Primary

The State grasps at the *nonpartisan* language in *Jones*, as it did similarly in *Reed*, to support its argument that I-872 does not nominate political party candidates.[8] But I-872 is not the "*nonpartisan* blanket primary" envisioned by *Jones*. If the sponsors of I-872 really intended for primaries to be truly *nonpartisan* they could very easily have removed all references to political parties from the statutes and adopted a general petition requirement for access to the ballot. Instead, the sponsors fashioned a system that not only did not remove references to political parties but also included a *new section* defining "partisan office." See I-872 § 4.

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[8] The Grange argues the matter similarly. (CD 70, at 5, 24, 25).

Jones specifically contemplated a *nonpartisan* system that included "nomination by established parties ***and*** voter-petition requirements for independents." *Jones*, 530 U.S. at 585 (emphasis added). Except to the extent it may have left minor party nominating statutes in place,[9] I-872 does neither. Hanging their entire analysis on the word "may" both defendants argue at great length they can add whatever qualifications for ballot access they wish, and that they are not confined to the ones outlined in the paragraph. (CD 65, at 17-19; CD 70, at 24-25). As will be seen in Part V below, the state is not free to configure ballot access qualifications outside constitutional limits.

Second, the defendants' arguments completely miss the central point of both *Jones* and *Reed*. As *Reed* explained: The rights of "those who actively participate in partisan activities ... to freely associate for this purpose is thwarted because the Washington statutory scheme prevents those voters who share their affiliation from selecting their party's nominees. *Reed*, 343 F.3d at 1204. A thorough reading of both cases reveals the overwhelming concern of both courts was not to parse out a *nonpartisan* "safe harbor" but to ensure that the expressive association rights of political party adherents were protected where they mattered most, in the election process.

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[9] See, Part II, infra.

II. WHETHER POLITICAL PARTIES HAVE THE RIGHT TO NOMINATE

The State Artfully Dodges the Question

Distilled to its essence, State does not argue against a political party's right to nominate candidates per se, which right the LP contends is *sui generis*, but rather whether any candidate nominated by the political party has a right of access to the general election ballot. This issue is treated more fully in Part V, below.

Validity of the Minor Party Nominating Statutes

As previously argued, I-872 did not repeal, amend or otherwise address the minor party nominating statutes. R.C.W. §§ 29A.20.110 through 29A.20.20[10] Section 9(3) of I-872 allows any candidate access the primary ballot and to enter a minor political party "preference" on his or her declaration of candidacy without any further qualification but payment of a filing fee. However, the minor political party nominating statutes include a provision that candidates so nominated would appear on the general election ballot. R.C.W. § 29A.20.121(1).

In lengthy footnotes (CD 65, at 9 n. 6; at 16 n. 14, and at 22 n. 17) the State attempts to gloss over its treatment of the issue, arguing that I-872 impliedly repealed the minor party nominating statutes.

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[10] Throughout this section references are made to the newer minor party nominating statutes. However, the reasoning should also apply to the older statutes.

> Repeal or amendment by implication is never favored [in Washington]. *Generaux v. Petit*, 172 Wash. 132, 19 P.2d 911 (1933). This is even more true when a later act contains a schedule of statutes repealed and such schedule does not include the statute under consideration. *State ex rel. Spokane v. DeGraff*, 143 Wash. 326, 255 P. 371 (1927).

Washington State Welfare Rights Organization v. State, 82 Wash.2d 437, 439, 511 P.2d 990 (1973).

Section 17 of the initiative, while purportedly repealing statutes inconsistent with I-872, did not repeal the minor party nominating statutes.

The State also argues that other statutes related to primaries, such as R.C.W. § 29A.52.116 (relating to nomination of major party candidates at primaries) are "obsolete." (CD 65, at 19, n. 16) This raises the question: How much of Washington's prior election system is no longer operative after I-872?

I-872 plainly did not reach the entire field of elections, because it did not address the classifications of "major" and "minor" political parties in any way. A "Major political party" is one whose candidate for statewide office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. R.C.W. § 29A.04.086. If I-872 does not "nominate political party candidates" what is the point of the statute?

Statutes relating to Precinct Committee Officers present another problem. They are a recognized internal part of the political party organizational apparatus. See, generally, Chapter 29A.80, R.C.W. However, R.C.W. § 29A.80.051 provides that PCOs are elected at the primaries, yet the State argues the I-872 primary does not "nominate political party candidates."

The LP does not seek resolution from this court whether these provisions are impliedly repealed, amended, obsolete or otherwise inoperative. Instead, the LP merely wants to show that I-872 did not, as the both the Grange and the State suggest, "cover the entire subject matter." Here the LP is concerned solely with the validity of the minor party nominating statutes.

In determining whether I-872 impliedly repealed, amended or otherwise rendered inoperative the minor party nominating statutes, "[t]he collective intent of the people becomes the object of the court's search for 'legislative intent' when construing a law adopted by a vote of the people. E. Crawford, *The Construction of Statutes*, § 365 (1940 ed.) p. 745." *Washington State Dept. of Revenue v. Hoppe*, 82 Wash.2d 549, 552, 512 P.2d 1094 (1973). To ascertain the collective purpose and intent of the people, material in the official voters' pamphlet may be considered. *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wash.2d 455, 460-461, 722 P.2d 808 (1986) (citations omitted).

The voter's pamphlet states, "I-872 will restore the kind of choice in the primary that voters enjoyed

for 70 years in the blanket primary."[11] Until the blanket primary was invalidated it included minor party candidates who had been nominated by conventions. The pamphlet also refers voters to the I-872 sponsor's website. That website, entitled: "Initiative 872 - Preserve the Blanket Primary"[12] contains the following dialogue under "Frequently Asked Questions."

> "Would this proposal eliminate minor party candidates from the primary or general election ballot?"
>
> "No. Minor parties would continue to select candidates the same way they do under the blanket primary...."[13]

Since minor parties selected their candidates by nominating convention under the blanket primary—using the primary only for the purpose of demonstrating a "modicum of support" and thus to gain access to the general election ballot, see, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)—the initiative sponsors may have intended that minor parties would continue nominating candidates by convention.[14] But the Grange is strangely silent on

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[11] See, Declaration of James Pharris, Exhibit A, page 4 (CD 66)

[12] This title to the website speaks volumes about the legislative intent of the sponsors of I-872.

[13] See, http://www.i872.org/faq.php. The entire text of the Frequently Asked Questions page from the I-872 website is already a part of the record as Exhibit 3 to the Declaration of John White (CD 8).

[14] Here the Declaration of Kevin Hansen, becomes important. The state asks this court to strike that declaration

the issue and the State applied a different interpretation to the legislative intent for I-872, promulgating emergency rules[15] declaring that I-872 "impliedly amended" the minor party nominating convention statutes. (CD 65, at 22 n. 17).

The Grange addresses the issue only tangentially, arguing "Washington law holds that the People's right to enact State laws by initiative or referendum may not be frustrated by legislation passed after a ballot measure is filed but before it is voted upon." (emphasis in original, citation omitted) (CD 70, at 21, n. 30) The result of this line of reasoning is merely that if any minor party nominating statutes are still effective they are the ones in effect at the time I-872 was filed (December, 2004).[16]

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for timeliness and relevance reasons. Mr. Hansen's declaration is timely because the Libertarian Party is relying upon it in response to the State's untimely Motion for Summary Judgment. It is relevant because it shows that the President of the Senate had determined that legislation repealing the minor party nomination statutes as proposed by the Secretary of State, HB 5745, would require a 2/3 vote under Washington Constitution, Art. II, § I(c), because the bill represented a material alteration to the initiative. (CD 64, Ex. C, page 24 of 24).

[15] See, Exhibit C to Declaration of James Pharris (CD 66).

[16] Chapter 29.24, R.C.W., (recodified and/or amended – depending whom you ask – approx. 2004). The significant differences between the old and new minor party rules related to the number of signatures required for a particular office and whether a certificate of nomination entitled a candidate to appear on the primary ballot or the general election ballot.

Identity, Not Truthfulness, Is The First Amendment Issue

The Grange complains that the LP wants the right of "prior restraint," i.e., the "right to approve of the truthfulness of a candidate's statement of preference." (CD 70, at 26, 30). This is absurd. The LP claims no right to regulate the speech of one who does not purport to speak in the name of the LP. However, the LP knows full well that political campaign speech is rarely "truthful," and it is for precisely this reason the LP claims a right to protect its identity by assuring that its message, and not someone else's, is promulgated in its name. "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (U.S., 2000). This issue is discussed in further detail at Part IV, below.

III. WHETHER I-872 COMPELS POLITICAL PARTIES TO ASSOCIATE WITH UNAFFILIATED VOTERS OR VOTERS AFFILIATED WITH OTHER PARTIES

The State concedes, if I-872 nominates political party candidates, then it "would indeed trigger a need to respect the associational rights of the political parties." (CD 65, at 25). The Grange argues that I-872 doesn't "compel the parties to do anything." (CD 70, at 32). This is simply another way of saying that the Grange wants to exclude the political parties from what is, by design, a partisan election system. As *Reed* has clearly taught us, "that

is the problem with the system, not a defense of it." *Reed,* supra.

IV. WHETHER I-872 FORCES A POLITICAL PARTY TO ASSOCIATE WITH CANDIDATES WHO DO NOT SHARE THE PARTY'S MESSAGE

Here again both defendants premise their argument on the assumption that I-872 does not nominate political party candidates. (CD 65, at 28) (CD 70, at 33). And again, "that is the problem with the system, not a defense of it." *Reed,* supra.

Party Trademark or "Brand" Rights

The State suggests that I-872 makes "party nominations an entirely private process." (CD 65, at 27). Assuming for the purpose of argument that this is true then the political parties have the right, as private entities, to protect use of their trademarked names. As the LP has previously shown, the term "Libertarian Party" is a registered trademark.[17]

> The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods. The consumer who knows at a glance whose brand he is being asked to buy knows whom to hold responsible if the brand disappoints and whose product to buy in the future if the brand pleases. ... *A*

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[17] See, Exhibit F to Declaration of Richard Shepard (CD 51)

> *successful brand, however, creates an incentive in unsuccessful competitors to pass off their inferior brand as the successful brand by adopting a confusingly similar trademark, in effect appropriating the goodwill created by the producer of the successful brand.*

Ty Inc. v. Perryman, 306 F.3d 509, 510 (7th Cir., 2002) (emphasis added).[18]

It is common knowledge that the name of a political party implies certain political views. The defendants obviously recognize the value of a political party name because they go to great lengths to assure that political party "information" goes to the voters whether or not the political parties have any control over who uses (or abuses) it. Just as clearly the Grange recognized a "*nonpartisan* blanket primary"[19] would increase the difficulty for each and every voter to question each and every candidate thoroughly in an effort to ascertain his or her political platform. It is the express intention of I-872 that voters use that political party name (a/k/a "information") to determine for whom to vote.

Thus the sponsors devised a scheme to co-opt the reputation and prestige of political party names

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[18] Many modern social scientists believe that participants view the election process as a "competitive marketplace" similar to the economic marketplace involving consumer goods and services. See, n. 8, supra. If so, then there is no reason why the protections available under trademark law should not be available to political actors.

[19] See, discussion supra, at n. 4, and accompanying text.

but which necessarily introduces the risk that voters will get an inferior "imposter" candidate "passing off" a party name, thus misleading the voters at the expense of the political parties' rights.

The Right to Exclude Candidates Who Do Not Follow Party Rules

The state focuses on a sing' case (among several) involving the right of political parties to determine their association with particular candidates. *Duke v Massey*, 87 F.3d 1226 (11th Cir. 1996). Even here the State acknowledges one of the recognized bases for affirming the exclusion of David Duke from the Republican ballot was that the Republican Party did not consider Duke to be a member of the party. Despite the several other reasons that may have informed the *Massey* holding, none of the cases in this category suggest that a political party does not have the right to exclude unacceptable candidates.

In *Ray v. Blair*, 343 U.S. 214, 72 S.Ct. 654 (1952), the court held a requirement that candidates of a political party in a primary election pledge support to the party's nominees does not deny equal protection or due process. "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party." *Blair*, 343 U.S. 214, 227, 72 S.Ct. 654 (1952)

This party right is not a function of state statute. *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 101 S.Ct. 1010 (1981)

Munro, 479 U.S. at 193 (approving Washington's former one percent ballot access requirement for party nominees) (internal citation omitted). Neither this Court nor any other federal court has approved a state law that requires a political party to obtain more than one-third of the vote to achieve access to the general election ballot.

The State's reliance on *Williams v. Rhodes*, 393 U.S. 23 (1968) and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) as justification for the modified blanket primary is misplaced both in principle and practice. Those cases involve access to the general election ballot and state electoral systems that unreasonably limited general election ballot access. To the extent that *Williams* applies to I-872, it provides another ground to invalidate the primary. To be assured of a position on the general election ballot, a single candidate of *any* political party must garner more than one-third of the total votes cast at the primary. This Court struck down the ballot access threshold of 15% in *Williams* as unreasonable, where a party could rally behind a single candidate for each office. A general election ballot threshold of higher than 5% has never been approved. *See Jenness v. Fortson*, 403 U.S. 431 (1971). Had I-872 been in place from 1992 to 2002, the general election ballots in Washington would have had only one minor party candidate where two or more major party candidates filed for a position. JA 752.

c. The modified blanket primary forces the Republican Party to associate with rival party voters.

The First Amendment prohibits Washington from forcing a political party to associate with rival-party and unaffiliated voters in nominating its candidates. *See*

Jones, 530 U.S. at 574 ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.") (internal quotation marks and citation omitted). "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575.

Section 3(3) of I-872 declares it a "fundamental right" to choose which candidate will carry the Republican standard in the general election, regardless of the "party preference or affiliation of either the voter or the candidates.[12] JA 411. The Explanatory Statement in the official Voters' Pamphlet confirms that I-872 results in rival-party and unaffiliated voters selecting the Republican standard bearer: "Voters would be permitted to vote for any candidate for any office, and would not be limited to a single party." JA 405. As with the blanket primaries invalidated in *Jones* and *Reed*, the participation of these voters is intended to change the Republican candidate in the general election. The initiative sponsor's website stated that the modified blanket primary "should force the political parties to compete more effectively for these offices. . . . Under this initiative, parties should seek candidates with broad public support who can survive a competitive primary." JA 73. The sponsor explained that "[q]ualifying primaries are more likely to produce public officials who represent the political preferences and opinions of a broad cross-section of the voters. Candidates

[12] California's blanket primary also guaranteed the "right" to choose which candidates would carry their party standard in the general election "regardless of . . . political affiliation." CAL. ELEC. CODE § 2001 (1999), cited in *Jones*, 530 U.S. at 570.

will need to appeal to all the voters, partisan and independent alike. They will not be able to win the primary by appealing only to party activists." JA 78-79.[13] These points are echoed in the official Voters' Pamphlet. JA 406 ("Parties will have to recruit candidates with broad public support. . . . "). In *Jones*, this Court described this objective as "nothing more than a stark repudiation of freedom of political association." 530 U.S. at 582.

I-872's goal of adulterating the Republican message by making its candidates more like the general electorate, and less like Republican voters, is prohibited:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.

Jones, 530 U.S. at 581-82 (emphasis in original); *see also id.* at 587 (Kennedy, J., concurring) ("The true purpose [of California's blanket primary] is to force a political party to accept a candidate it may not want, and, by so doing, to change the party's doctrinal position on major issues."). The State may not substitute its judgment for that of the Republican Party regarding the message it advances. *See Hurley*, 515 U.S. at 579 ("[T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the

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[13] The initiative also unconstitutionally seeks to redirect the focus of minor political parties from high-profile statewide and federal offices to lower-level elected offices. JA 80.

government."); *Jones*, 530 U.S. at 587 (Kennedy, J., concurring) ("[Although a] political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal . . . , this is an issue for the party to resolve, not for the State."); *Pacific Gas*, 475 U.S. at 20 ("Our cases establish that the State cannot advance some points of view by burdening the expression of others.").

The State analogizes I-872 to Washington's ballot access statute at issue in *Munro*. State Br. at 22, 38. In *Munro*, the Socialist Worker Party objected to the statutory requirement that its nominee, who was its sole candidate, receive one percent of the total vote cast in the primary in order to advance to the general election. Washington's applicable law expressly vested in the Socialist Workers Party exclusive authority to choose its nominee. *See* 479 U.S. at 191. Washington law also gave each minor party the right to prevent unauthorized use of its party name on the ballot. *See, e.g.*, WASH. REV. CODE § 29.24.045(2) (2002). Unlike I-872, primary voters were not presented with all candidates who wanted to run under the Socialist Workers Party standard, but rather only the single candidate nominated by the party. The intraparty competition had already been resolved.[14]

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[14] With respect to minor party candidates, Washington's old blanket primary might have operated as a type of "nonpartisan blanket primary." The minor parties nominated candidates by conventions of their adherents, and then had to show a modicum of support at the primary to advance to the general election. For them, Washington had "separat[ed] the nominating process from the winnowing process," State Br. at 38, but I-872 continues the primary's use to resolve intraparty competition.

2. Even if I-872 did not select the Republican Party's standard bearers for the general election, it severely burdens core First Amendment rights by reducing the right to nominate to a right to endorse.

Petitioners contend that under I-872, "voters do not choose a party's nominee," State Br. at 41, and "primary voters are not choosing any political party's nominee." Grange Br. at 31 (emphasis in original).[15] If this were true, I-872 still places a severe burden on the Party's "basic function" of choosing its own leaders.

A political party has the right to nominate under its own rules absent a valid state requirement of a primary to resolve the intraparty contest. *See, e.g., American Party v. White*, 415 U.S. 767, 781 (1974); *Ray*, 343 U.S. at 220-21. At statehood, Washington recognized this inherent power, *see* 1889-90 WASH. LAWS, ch. XIII, p. 419, §§ 2-3, and general election ballots reflected a candidate's party designation from the certificate of nomination filed by the political parties. *See id.*, p. 406, § 17. Washington did not

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[15] The Grange points repeatedly to emergency regulations (WASH. ADMIN. CODE § 434-262-012 (2005)) adopted by Washington's Secretary of State for the proposition that I-872 does not "serve" to nominate the Republican Party's candidates. The regulations, to the extent that they are even relevant to interpreting I-872, should be disregarded. The State rushed to adopt those regulations in anticipation of a challenge to I-872. "There are two reasons why the [Declaration of Candidacy] form needs to be finalized in such an expeditious manner. One, the form needs to be adopted by emergency WAC prior to the political party's lawsuits, which are expected to be filed first thing next week. . . ." Appendix to Republican Party Brief 4a. This Court has rightly rejected litigation positions masquerading as legitimate exercises of regulatory authority. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

abolish the right to nominate when adopting its direct primary law in 1907. It merely required the Republican Party to determine its nominee through a public process.[16] From 1907 onward, the "nominee" of the Republican party chosen at the primary appeared on the general election ballot. *See, e.g.*, WASH. REV. CODE § 29.30.095 (2002).

The State maintains that I-872 "returns the relationship between the political parties and the state to what existed before the state required a party primary nominating process, and returns to the parties the ability to select their nominees however they choose." State Br. at 37. Both the State's pre-litigation interpretation of the statute and Washington's nomination process prior to 1907 contradict this claim. Following passage of I-872, the Republican Party notified state election officials that it would nominate Republican candidates by convention. JA 82-87. The election officials uniformly responded that there is no "language associated with the Initiative that contemplates a partisan nomination process separate from the primary." JA 104-11. Prior to the adoption of the direct primary in 1907, and in contrast to I-872, election officials ensured that political parties' nominees were properly certified to represent the parties. *See* 1889-90 WASH. LAWS, ch. XIII, pp. 400-04, §§ 3-10. I-872 even purports to strip Washington's political parties of the power to "perform all functions inherent in such an organization." I-872, § 14, JA 418.

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[16] The 1907 primary election law acknowledged nomination of candidates as one of the "functions inherent to [political parties], the same as though this act had not been passed: *Provided*, that in no instance shall any convention have the power to nominate any candidate to be voted for at any primary election." 1907 WASH. LAWS, ch. 209, § 22.

A state's ability to regulate the time, place and manner by which parties select their standard bearers is limited by the First Amendment right to associate. *See Eu*, 489 U.S. at 222. With no other effective mechanism for nominating candidates under I-872, intraparty competition among candidates who identify with the Republican Party is resolved at the primary. In essence, the modified blanket primary, like the primary invalidated in *Jones*, "has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the 'basic function' of choosing their own leaders." *Jones*, 530 U.S. at 580 (internal citation omitted). Any "nomination" by the Republican Party under I-872 is functionally identical to a mere endorsement. The expression of a "preference" by the Republican Party among the identified Republicans on the primary ballot has the same effect as an expression of "preference" among the Republicans on the primary ballot by the Washington Grange.

> The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu*, we recognized that party-leadership endorsements are not always effective – for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo.

Jones, 530 U.S. at 580.[17]

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[17] The Court specifically noted that a party's recommendations, even to its members in a closed primary, can be of limited value. *See Jones*, 530 U.S. at 580-81. I-872 does not restrict balloting for Republican identified candidates to Republicans, further reducing the utility of party "endorsement."

3. The State has no interest in forcibly associating the Republican Party with any candidate who seeks to use the Republican Party's name to advance a quest for public office and with non-affiliated or rival party voters.

Neither petitioner argues that I-872 serves a compelling state interest and is narrowly tailored to serve that interest. Nor did they advance that claim before the Court of Appeals. Pet. App. 30a. As a result, if I-872 severely burdens the Republican Party's First Amendment rights, no further discussion is needed. Even under a relaxed standard of testing constitutionality for state-imposed burdens that are not severe, however, I-872 fails.

a. The State's asserted interests in providing easy ballot access for candidates and in informing voters do not justify burdening the Republican Party's with messages and messengers the Party does not want.

It is up to an expressive association, not the State, to determine which messages or participants in the association would impair its message. *See Dale*, 530 U.S. at 653 ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."); *Hurley*, 515 U.S. at 575 ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."); *Democratic Party v. Wisc. ex rel. La Follette*, 450 U.S. 107, 123-24 (1981) ("[A] State . . . may not constitutionally substitute its own judgment for that of the Party."). I-872 forces the Republican Party to include messages and speakers in its "parade" that may

be contrary to the message the Party wants to send. Contrary to the Grange's contention, Grange Br. at 36, the parade in question is not the "modified blanket primary," but rather the Republican Party itself, and I-872 forces association of the Republican Party and its message with candidates not of its choosing.

The State's claimed interest in providing "easy access to the ballot," State Br. at 30, could be accomplished without forcing the Republican Party to be associated with unwanted candidates. The State could guarantee access for independent and minor party candidacies,[18] which satisfies the First Amendment interests of both the candidate and voter. *See Duke v. Massey*, 87 F.3d at 1234 (" . . . Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. Duke's supporters were not foreclosed from supporting him as an independent candidate, or as a third party candidate in the general election.").

A state has no valid interest in placing information on the ballot for the purpose of influencing how voters use the franchise. Thus, Missouri's effort to influence voters by communicating whether a candidate supported or opposed term limits was prohibited. *See Cook v. Gralike*, 531 U.S. 510 (2001). Similarly, Louisiana's inclusion of a candidate's race on the ballot was also prohibited as an improper effort to promote race-based voting. *See Anderson v. Martin*, 375 U.S. 399 (1964). Printing a candidate's self-selected party preference,

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[18] Washington's present primary laws (also in effect immediately before adoption of I-872) provide guaranteed access to the general election ballot for both third party and independent candidates. *See* WASH. REV. CODE § 29A.20.121(1), (4) (2006).

where that preference is not reciprocated, is to provide that candidate with the electoral advantage that comes from association with a major political party.[19]

Petitioners do not dispute that the State will list on the ballot, with the Republican label, candidates for whom the Republican Party has no preference, the same as the State's listing of candidates who have been selected by the Party. Washington's Supreme Court has recognized that a nonprofit association has a protectable interest in its name and may prevent unauthorized use: "an established fraternal organization is entitled to relief when its name or one so similar as to be deceiving is adopted by another organization and used in a manner which is confusing and deceiving to the public and is detrimental to the organization already using the name." *Grand Lodge*, 381 P.2d at 135. The district court correctly concluded "that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates." Pet. App. 79a.

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[19] Washington's asserted interest in providing "information" to voters by listing candidates' "party preference" on the ballot could only possibly be satisfied if the "party preference" correctly reflects whether the candidate actually accepts the principles espoused by his preferred party. I-872's "party preference" provision, however, provides no more reliable information about a candidate's policies or positions than expressing a preference for the color "blue" on the ballot.

b. The State calls into question the primary systems of forty-nine other states by asserting that a constitutionally effective vote requires the ability to participate in selecting the standard bearers of multiple parties.

The State asserts that the right to cast an "effective vote" includes not being "limited to voting for the candidates of a single political party" at the primary. State Br. at 30. The claim contradicts this Court's conclusion that the right to cast an effective vote does not include selecting the standard bearer of a party to which the voter does not belong. *See Jones*, 530 U.S. at 583. It also calls into question the primary system of the forty-nine states that preclude a voter from casting an "effective vote" by limiting the voter to participation in a single primary.[20] "If the 'fundamental right' to cast a meaningful vote were really at issue in this context, [the blanket primary] would be not only constitutionally permissible but constitutionally required, which no one believes." *Id.* at 573 n.5. Under the State's formulation, not even the Republican Party's determination of its membership and association could prevail over the voter's right to cast an "effective vote."[21]

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[20] The District Court for the Northern District of Mississippi recently classified the primary election systems of all fifty states. *See Miss. State Democratic Party v. Barbour*, No. 4:06CV29-P-B, 2007 U.S. Dist. LEXIS 41908 at *24-*33 (E.D. Miss. June 8, 2007). Every state other than Washington (and Louisiana for state elections) limits voters to a single party's ballot for the primary election.

[21] The State also attempts to justify I-872 because it may advance some voters' "wish to associate with a minor party that has difficulty obtaining access to the primary ballot." State Br. at 29. In essence, the State asserts that by erecting obstacles to minor party ballot access, it can bootstrap its way to validating I-872's intrusion on the Republican Party's right to select its nominee. The State is wrong.

There would be no limiting construction on the State's conception of the right to cast an "effective vote."

The State's rule also has profound implications for the right of association outside the political primary context. It challenges any organization's right to determine the scope of its expressive association and shifts the right to define the make-up of the organization from the group to any individual who wishes to participate. *Contra Dale*. Under its rule, the State could decide that individuals could force parade organizers to include messages contrary to the message of the organizer's choice. *Contra Hurley*; *contra Pacific Gas*. At its base, the "right" to cast an "effective vote" by participating in selecting the messenger and message of a party to which a voter does not belong repudiates much of existing First Amendment jurisprudence, including both *Jones* and *Clingman*.[22]

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[22] *Amicus* State of Louisiana asserts that this Court's decision regarding Washington's primary should have no effect on the Louisiana system. The Court need not attempt to issue an advisory opinion on Louisiana law. First, Louisiana uses a "closed primary" to nominate candidates for Congress. *Amicus* Br. at 7. For state offices, Louisiana does not have a true primary election at all. Its "primary" is, by operation of law, a general election. The primary's status as a general election is what prompted this Court to hold that the Louisiana system violated federal law requiring a uniform election day for congressional offices. *Foster v. Love*, 522 U.S. 67, 72 (1997). Second, there is nothing in the record to indicate whether Louisiana's political parties have objected to, or have rules inconsistent with, its primary system. In the absence of any developed record or indication that Louisiana's system is in any way inconsistent with political party rules, or objectionable to Louisiana's political parties, the Court should not attempt to resolve the constitutionality of the Louisiana system. Third, under Louisiana law, the parties may collect an additional filing fee from candidates who seek to run under the respective party banners. LA. REV. STAT. ANN. § 18:464(C) (2007). To the extent that the parties accept fees from candidates, they may be said to have ratified an association with the candidate. Louisiana also permits candidates to appear on the ballot

(Continued on following page)

4. The State may not evade constitutional protections on core First Amendment rights by cosmetic changes to nomenclature, mere labels, and sham declarations of permitted legislative purpose.

I-872 makes cosmetic changes to Washington law in order to continue the same state conduct previously held to violate the First Amendment right of the Republican Party to select its standard bearers, its "ambassadors to the general electorate." Fundamental constitutional rights are not subject to legislative evasion, whether by serial evasion of rights under the Fourteenth and Fifteenth Amendments in the "White primary" cases, term limits for members of Congress, or sham declarations of secular purpose to avoid the Establishment Clause. If a state statute deprives persons of rights under the federal Constitution, it is invalid whether the deprivation is direct or indirect, "sophisticated [or] simple-minded." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995).

From 1927 to 1953, this Court repeatedly addressed Texas' efforts to defeat equal protection and the right to vote under the Fourteenth and Fifteenth Amendments. In *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court struck down a Texas statute that explicitly barred African-Americans from voting in the Democratic primary. Texas promptly adopted a different primary law, transferring authority to determine voting qualifications to the

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under a party name based on signatures of voters, regardless of party affiliation and without allowing parties to collect an additional fee. *Id.* §§ 18:461(A)(1) & 18:465(D). Under *Jones*, that method of qualifying to appear on the ballot under a recognized party name may not survive constitutional scrutiny if contrary to the rules of a political party.

Democratic Party, which also barred African-Americans. Justice Cardozo noted that "[t]he result for [Nixon] is no different from what it was when his cause was here before. The argument for the respondents is, however, that identity of result has been attained through essential diversity of method." *Nixon v. Condon*, 286 U.S. 73, 83 (1932) (Cardozo, J., concurring). The Court declared the revised Texas primary statute unconstitutional. Texas then freed the Democratic Party from state oversight, leading again to the exclusion of African-American voters from the primary election and this Court's subsequent decision in *Smith v. Allwright*, 321 U.S. 649 (1944). In *Terry v. Adams*, 345 U.S. 461 (1953), the Court faced and invalidated yet another effort to evade compliance with the Constitution, in the form of the Jaybird Democratic Association. Concurring that the "Jaybird primary" violated the Constitution, Justice Clark noted that "[a]n old pattern in a new guise is revealed by the record." 345 U.S. at 480 (Clark, J., concurring).

The modified blanket primary is also an old pattern in a new guise. I-872 "will give voters the freedom they enjoyed under the blanket primary – to vote for any candidate they prefer for each office." JA 77. I-872 expressly declares a "right" to "cast a vote for any candidate . . . without any limitation based on party preference or affiliation, of either the voter or the candidate." I-872, § 3(3), JA 411.[23] This declaration directly contravenes a long line of First Amendment precedent summarized in *Jones*: "[A] nonmember's desire to participate in the

[23] Washington's former blanket primary granted the same "right" to vote for "any candidate for each office, regardless of political affiliation." WASH. REV. CODE § 29.18.200 (2002).

party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 530 U.S. at 584 (internal quotation marks omitted).

In *U.S. Term Limits*, the Court noted that the name "U.S. Term Limits, Inc." implied the forbidden purpose of the state constitutional amendment: "[a] practical limit on the terms of the members of the Congress." 514 U.S. at 829 n.42. Here, the sponsor's website to promote I-872, "www.blanketprimary.org," JA 66, and its battle-cry, "I-872 – Preserve the blanket primary," JA 65, reveal what I-872 is: the old blanket primary repackaged.

The modified blanket primary also sought to achieve an identity of result through diversity of method. Petitioners assert that by substituting "preference" for "designation" in the filing statute, I-872 avoids the parties' First Amendment rights. *See* I-872, § 9(3), JA 415. However, the government "cannot foreclose the exercise of [First Amendment] rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). I-872 still compels the Republican Party to be associated with candidates against its will, and to have unaffiliated and rival party voters select its "ambassador to the general electorate." *Jones*, 530 U.S. at 575.

Repeated assertions that voters are not selecting the party's nominee cannot alter the statute's purpose or effect. The purpose of a statute is determined "by drawing logical conclusions from its text, structure, and operation." *Nguyen v. INS*, 533 U.S. 53, 68 (2001). When evaluating the legislative purpose in a constitutional challenge, this Court can and does reach beyond the face of a statute. "While the Court is normally deferential to a State's articulation of . . . purpose, it is required that the

statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (declaration of secular purpose in requiring teaching of "creation science"). A court may find improper purpose behind a statute by examining the statute on its face, its legislative history, the historical context of the statute and the specific sequence of events leading to passage of the statute. *Id.* at 594-95. With I-872, the prohibited purpose is manifest in the statute itself, its context, and the sequence of events leading to its passage.[24]

The old blanket primary was declared unconstitutional. *See* I-872, § 2, JA 411. Washington's legislature passed a bill similar to I-872 that the governor vetoed, expressing both practical and constitutional concerns with that version of the modified blanket primary. JA 573-579. The replacement primary system adopted by Washington "gave the state party bosses more control over who appears on the general election ballot." Official Voters' Pamphlet "Statement For" I-872, JA 407. Petitioner Grange "opposes primaries in which voters are restricted to voting for candidates of only one party and does not want to see political parties gain control of the primary." JA 77. The Grange launched the I-872 campaign because "[w]e know that the voters of Washington overwhelmingly

[24] Even I-872's asserted purpose to increase voter choice and help third parties is suspect. The Court need give no deference to I-872's declaration of preserving voter choice where "the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). The effective elimination from the general election of third parties altogether and even one of the major parties in areas where it may be weak does not protect "voter choice," which is a function of diverse voices at the general election. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).

support the blanket primary. . . . Through this initiative, we can continue to have all the benefits of the blanket primary system, including the right of a voter to pick any candidate for any office." JA 69-70. Under I-872, "[c]andidates for partisan offices would *continue* to identify a political party preference when they file for office, and that designation would appear on both the primary and general election ballots." JA 68 (emphasis added). State election officials were "not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." JA 105, 107, 109, 111. Set against I-872's operative provisions and their explanation by the sponsor, conclusory assertions that primary voters are not determining the parties' nominees are contrary to fact and common sense.

5. The lower courts violated neither separation of powers nor principles of federalism when striking down an initiative that violated the First Amendment.

The Grange's assertion that principles of federalism justify I-872's invasion of core rights of political association because states should be free to be "laboratories" ignores the numerous decisions of this Court invalidating state experiments that tread upon the First Amendment, including the invalidation of California's experiment with the blanket primary. *See Jones*; *Hurley* (invalidating application of state anti-discrimination statute that impaired expressive association); *Dale* (same); *Cook* (state "experiment" providing voters with "information" intended to affect exercise of franchise). Declaring I-872 invalid was fully in accord with principles of federalism and the supremacy of the federal Constitution. *See* U.S. CONST.

art. VI, cl. 2. Principles of federalism did not justify Connecticut's invasion of core rights of political association in *Tashjian* because the state's ability to regulate elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." 408 U.S. at 217.

Similarly, neither lower court violated the separation of powers by declaring I-872 invalid. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). The Grange's reliance on *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006) is misplaced. This Court noted: "Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy." *Id.* at 329. The Court has very clearly articulated the "background constitutional rules at issue":

- "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights." *Tashjian*, 479 U.S. at 217.
- "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.
- Political parties have the right to "identify the people who constitute the association, and to limit the association to those people only." *La Follette*, 450 U.S. at 122.
- "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication

advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 551 U.S. at 576.

- Candidates carrying the party standard are "the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575.
- There is "no heavier burden on a political party's associational freedom" than forcing it to associate with nonmembers and rivals at the point of selecting its standard bearer. *Jones*, 530 U.S. at 582.

The remedy is also easily articulated. The district court enjoined the State from implementing the initiative, and the court of appeals affirmed the permanent injunction.

I-872 by its terms, intent, and operation impaired the Republican Party's First Amendment rights, and both lower courts acted squarely within the powers of the judicial branch in declaring it unconstitutional.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted.

JOHN J. WHITE, JR.
Counsel of Record
KEVIN B. HANSEN

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121 Third Avenue
P.O. Box 908
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425-822-9281

APPENDIX

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

vs.

DEAN LOGAN, King County Records & Elections Division Manager, et al.,

Defendants,

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-TSZ

DECLARATION OF KEVIN B. HANSEN

NOTE ON MOTION CALENDAR: WEDNESDAY, JULY 13, 2005

WITH ORAL ARGUMENT

KEVIN B. HANSEN declares under penalty of perjury under the laws of the State of Washington and the United States of America as follows:

1. I am one of the attorneys for the plaintiffs in this lawsuit, am competent to testify, and make this declaration of my own personal knowledge.

. . . .

4. Attached hereto as Exhibit 3 are true and correct copies of the following pages of the documents received from the Secretary: 7, 11, 30, 41, 158-59, 228-29, 231, 302-03, 381-82, 453, 467-69, 583, and 728.

SIGNED this 23rd day of June, 2005 in Kirkland, Washington.

/s/ Kevin B. Hansen
KEVIN B. HANSEN

EXHIBIT 3

to

Declaration of

Kevin B. Hansen

From: Cervantes, Amber

Sent: Friday, May 13, 2005 4:54 PM

To: [Recipients' names omitted]

Cc: Elections – All

Subject: Declaration of Candidacy

Dear Election Administrators,

Attached is the Declaration of Candidacy Form including instructions. They have been revised to reflect the suggestions made at conference. We are going to have the forms reprinted. The office of the PDC plans to have them out in the mail to you by the end of May/beginning of June.

Please review the form and instructions and provide any suggestions for change to me by 3:00 pm on Monday, May 16.

There are two reasons that the form needs to be finalized in such an expeditious manner. One, the form needs to be adopted by emergency WAC prior to the political party's [sic] lawsuits, which are expected to be filed first thing next week. And two, the form needs to get to the printer so that the PDC has plenty of time to get the forms out to the counties.

Thank you and have a great weekend.

Amber Cervantes
Office of the Secretary of State
Certification and Training Program
360.902.4165
acervantes@secstate.wa.gov

[Additional Pages Omitted]